Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RESAT KELES,

Petitioner,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, AND JOHN BRADEMAS, AS PRESIDENT OF NEW YORK UNIVERSITY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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PUBLISHER'S NOTE:

THE FOLLOWING PAGES WERE UNAVAILABLE FOR FILMING:

i, ii & iii

QUESTIONS PRESENTED

1.

Whether petitioner's right to due process of law under the Fifth Amendment of the Constitution was violated by the inferior courts failing to enforce settled procedural requirements ?

It is respectfully submitted that this question be answered in the affirmative.

2.

Whether petitioner's right to due prcocess of law under the Fifth Amendment of the Constitution was violated by the inferior courts refusal to submit genuine issues of material fact to a jury ?

It is respectfully submitted that this question be answered in the affirmative.

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PARTIES BELOW

Parties to the proceeding below, as required by Supreme Court Rules 14.1(b) are listed in the following footnote.[1]

[1] Petitioner is Resat Keles .
Respondents are New York University.

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RESAT KELES,

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NEW YORK UNIVERSITY,DR. MARTIN HOFFERT,DR. GABRIEL MILLER, DR. FERHAD KAZEMI, AND JOHN BRADEMAS , AS PRESIDENT OF NEW YORK UNIVERSITY,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Resat Keles, respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuits entered in Resat Keles v. New York University et. al., on June 6, 1995.

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit affirmed a decision of the United States District Court of the Southern District of New York in an unpublished opinion dated April 13, 1995 is reprinted in the Appendix at A3. The Court of Appeals opinion was that of a unanimous 2-judge court, the third panel member having recused himself.

The Court of Appeals, on a motion for re-hearing or in banc consideration of this case denied re-hearing. The denial of in banc review is reprinted in the Appendix at A2. The denial of the motion for in banc consideration was filed on June 6, 1995.[1]

The memorandum and order of the district court dated April 6, 1994, granting summary judgment is reproduced in the Appendix at A11.

The judgment of the district court dated on April 11, 1994, dismissing the complaint on various grounds,and closing the case pursuant to Rules 56(b) is reprinted in the Appendix at A33.

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[1] Under Court Rule 30.1 this filing is timely as the 90th day following the denial of in banc review was September 2, 1995, a Saturday and the next day the Court was open is September 5, 1995.

JURISDICTION

The Court has jurisdiction in this case pursuant to 28 U.S.C. 1251(1). The United States Court of Appeals for the Second Circuit had jurisdiction to pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

This petition involves the Due Process Clause of the Fifth Amendment of the United States Constitution, Rule 56 of the Federal Rules of Civil Procedure and United States District Court for the Southern District of New York Local Rule 3(g), all of which are set forth as follows:

United States Constitution, Amendment V.

" No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation. "

Federal Rule of Civil Procedure 56

" Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service or a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters states therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing that there is a genuine issue for trial. If the

adverse party does not so respond summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged in guilty of contempt. "

United State District Court
for the Southern District of New York
Local Rule 3

" Rule 3. Motions

(a) [Repealed].

(b) Upon any motion the moving party shall serve and file with the motion papers a

memorandum setting for the points and authorities relied upon in support of the motion divided, under appropriate headings, into as many parts as there are points to be determined. The opposing party shall serve and file with the papers in opposition to the motion an answering memorandum, similarly divided, setting forth the points and authorities relied upon in opposition. Failure to comply may be deemed sufficient cause for the denial of the motion or the granting of the motion by default.

(c) The notice of motion, supporting affidavits and memoranda, with proof of due service, shall be served in accordance with the following:

(1) All motions and exceptions under Rules 26 through 37 inclusive of the Federal Rules of Civil Procedure, and under Rules 27 and 30 (insofar as they apply to interrogatories), 31, 32, 32A, 32B and 32C of the Federal Rules of Practice in Admiralty and Maritime Cases, shall be served at least five (5) days before the return date unless otherwise provided by statute or directed by the court. Where such service is made, opposing affidavits and answering memoranda shall be served no later than noon of the day preceding the return day.

(2) Unless otherwise provided by subparagraph 1, statute, or the Federal Rules of Civil Procedure, and except for petitions for writs of habeas corpus, in all civil motions and exceptions. The notice of motion, supporting affidavits, and memoranda of law shall be served at least fifteen days before the return day unless otherwise directed

by the court. Where such service is made, opposing affidavits and answering memoranda shall be served at least seven days, and reply papers, if any, at least two days before the return day.

(3) No papers, either in support of or in opposition to the motion, which have not been served as provided will be accepted for filing or received by the court except on special permission granted by the court for good cause shown.

(4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reason why procedure other than by notice of motion is necessary.

(d) Upon any motion based upon rules or statutes the notice of motion or order to show cause shall specify the rules or statutes upon which the motion is predicated. If such specification has not been made, the motion may be stricken from the calendar.

(e) Upon any motion, objections or exceptions addressed to interrogatories, answers to interrogatories or requests for admissions, under Rule 37(a), Federal Rules of Civil Procedure, the moving party shall specify and quote verbatim in the motion papers each interrogatory, answer or request to which the objection or exception is taken and immediately following each specification shall set forth the basis of the objection or exception.

(f) Upon any motion of the type described in subparagraph (10 of paragraph (c) of this rule shall

be heard unless counsel for the moving party files with the court at or prior to the argument an affidavit certifying that said counsel has conferred with counsel for the opposing party in an effort in good faith to resolve by agreement the issues raised by the motion without the intervention of the court and has been unable to reach such an agreement. If part of the issues raised by the motion have been resolved by agreement, the affidavit shall specify the issue so resolved and the issues remaining unresolved.

(g) Upon any motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Failure to submit such a statement constitutes grounds for denial of the motion.

The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

All material facts set forth in the statement required to be served by the moving party will be deemed admitted unless controverted by the statement required to be served by the opposing party.

(h) Motions marked off the calendar shall not be restored by consent or stipulation.

(i) The judge may direct the parties to submit motions and may determine them without oral hearing.

(j) A notice of motion for reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion and shall be served at least the same number of days before the return day as was required for the original motion. There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decision which counsel believes the court has overlooked. No oral argument shall be heard unless the court grants the motion and specifically directs that the matter shall be reargued orally. No affidavits shall be filed by any party unless directed by the court.

(k) Repealed.

(1) [Southern District Only] No motion of the type described in subparagraph (1) of paragraph (c) of this rule shall be heard unless counsel for the moving party has first requested an informal conference with the court and such request has either been denied or the discovery dispute has not been resolved as a consequence of such a conference."

STATEMENT OF THE CASE

Introduction

Petitioner Resat Keles (hereinafter "petitioner" or "Keles") commenced this action by filing a summons and complaint in the United States District Court for the Southern District of New York

on or about November 4, 1991. (See, Docket Entry 1, See, Verified Complaint. The verified Complaint is reproduced in the Appendix at A35.

This is an action by a student against his former university, New York University and members of the NYU faculty and administration (hereinafter collectively "NYU").

Petitioner's complaint sets forth three (3) causes of action: the first and the second for breach of contract and the third for fraud and misrepresentation arising from appellant's wrongful ouster from NYU's doctoral program in Applied Science.

Petitioner's requested relief was solely money damages in the amount of $30,000,000.00 on each cause of action and he sought no form of injunctive relief or reinstatement as a doctoral student. NYU sought and obtained a delay in answering the Complaint to December 13, 1991 and, on December 13, 1991 defaulted. NYU, without first having sought to vacate its default pursuant to Rule 55(c), moved to dismiss the complaint on or about February 7, 1992, nearly two (2) months after the expiration of the Stipulation extending time to answer or to move with respect to the complaint. (See, Docket Entry 8, See, Notice of Motion and supporting papers reproduced in the Appendix G at A52.

NYU's motion was a "speaking motion" and sought dismissal of petitioner's Complaint for failure to state a claim, because this action was barred by the Statute of Limitation, dismissal on the ground that

Petitioner's Complaint failed to plead fraud with specificity as the required of Rule 9(b) or, alternatively, summary judgment. NYU did not file a statement of undisputed facts as required by United States District Court for the Southern District of New York Local Rule 3(g) in connection with its request for summary judgment. This statement is mandatory under Local Rule 3(g).[2]

The United States District Court (Shirley Wohl Kram, D.J.) did not notify petitioner that the motion would be treated as one for summary judgment despite the District Court's having withheld decision on the motion for over two (2) years). Notice of an intent to treat a motion to dismiss as one for summary judgment is required and which the District Court ought to have done in the absence of the required Local Rule 3(g) statement. Fed. R. Civ. Pro. 12 (b) (6).

Petitioner opposed NYU's motion and indicated that the District Court had been advised at a conference held on January 24, 1992 that NYU was, at that time, in default under the Stipulation extending time and had been in default for forty-two (42) days prior to the conference. See, Affirmation of Morgan Kennedy which is reproduced in the Appendix H commencing at A74. The District Court, without resort to Federal Rule of Civil Procedure 55(c) and without NYU's making a motion or any showing of good cause, permitted appellees until February 7, 1992 to file their motion.

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[2] The Local Rule provides that "there shall be annexed to the notice of motion a separate, short and concise statement of the material facts which the moving party contends there is no genuine issue to be tried."

The District Court, as will be more fully discussed below, granted summary judgment and the case was dismissed two (2) years, one (1) month and nine (9) days after the last paper was filed on the motion. (See, Docket Entry 14). NYU never interposed an Answer in the case and there was no discovery taken by either party. (See, Memorandum Opinion and Order, reproduced in the Appendix C commencing at A11). A timely Notice of Appeal was filed from the District Court's Memorandum Opinion and Order and appeal ensued and concluded with the Court of Appeals' affirmance of the District Court's Order. The Notice of Appeal is reproduced in the Appendix E at A34.

Statement of Facts

Petitioner was a fully matriculated doctoral student at NYU. He was a candidate for a Ph.D. degree in Applied Science. Petitioner completed all his coursework with a grade average of "A."

Petitioner was on the last rung of the ladder to his Ph.D. degree,passing the Qualifying Examination. Petitioner took and, according to NYU, failed the qualifying examination. Petitioner contended and contends that he passed the examination. (See, Appendix S, reproduced commencing at A134).

Petitioner, in the course of contesting his grade and the issue of his re-taking the examination, was discontinued as a student and his transcripts were altered to incorrectly state that he had not been in the Ph.D. program following the commencement of this litigation.

REASONS FOR GRANTING THE WRIT

This case presents a significant opportunity for this court to clarify a conflict amongst the Circuit Courts. (See, infra, pp 37-38).

This case also presents an opportunity for the Court to provide further guidancein the as applicable criteria in considering motions for summary judgment. Summary judgment, which deprives a pleader of an opportunity to present his case to a jury, is a drastic remedy and one whose over use is tempting to clear a crowded docket of difficult but potentially meritorious cases. This case also provides an opportunity for the Court to clarify the point in the proceedings where a summary judgment motion should be interposed because, as has oft been stated, the discovery process enacted with the creation of the Federal Rules of Civil Procedure is the vital litigation tool for determining what the facts are as opposed to the untested conclusory allegations of fact crafted by attorneys in the drafting of affidavits.

The Court might also take cognizance of the fact that, unlike the situation which obtained prior to liberalization in grants of summary judgment post Anderson and Celotex, the pendulum has now swung the other way and summary judgment is now being over-utilized to clear crowded dockets.

THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

Petitioner was substantially prejudiced by the handling of this motion by his former attorney, Morgan Kennedy, Esq. and was additionally prejudiced by the extensive and unjustified delay on the part of the District Court in resolving this motion. The District Court, despite the existence of genuine issues of material fact, held that NYU could apply new rules ex post facto and that they were not bound by the contract which arose when the Chairman of the Department of Applied Sciences, Dr. Martin Hoffert, told petitioner that he could re-take the disputed examination an indefinite number of times, in effect, until he passed. (See, Appendix J-1, cited infra.). The District Court ignored (1) NYU's unexcused default; (2) the procedural irregularities of NYU's motion; and (3) failed to apply the Gibson standard as set out by this Court.[3] All these errors were adopted and compounded by the Court of Appeals.

Fed.R.Civ.Pro.56 provides for entry of summary judgment in appropriate cases and sets out a procedure for considering such motions for accelerated judgment and the basis of the proof to be advanced on the motions. The Rule provides that judgment shall "be rendered forthwith if the

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[3] Gibson v. American Broadcasting Companies, Inc., 892 F2d 1128, 1123 (2d Cir. 1989); see also, In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 258 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Even were both parties to seek summary judgment the District Court may determine that issues existed that require submission to a jury and deny summary judgment. Cargill v. Charles Kowsky Resources, Inc., 949 F.2d 51 (2d Cir. 1991).

The burden of establishing the non-existence of genuine issues of material fact rests on the party seeking summary judgment. Wright, Miller & Kane, §2727, p.121, Vol. 10A (1993 Ed.); see also, Moore, Taggart & Wicker, Moore's Federal Practice, ¶ 56.15 [3] (2d Ed. 1985). It is also black-letter law that issue finding and not issue determination is the District Court's mission on a motion for summary judgment. That mission was not carried out in this case either by the District Court or by the Court of Appeals.

Rule 56(e) states, in pertinent part:

> Supporting and opposing affidavits shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Under that standard the Meloy Affidavit is formally insufficient for Rule 56 purposes. Beyah v. Coughlin, 789 F.2d 986, 989-90 (2d Cir. 1986)(the

affidavit of an attorney not based on personal knowledge is entitled to no consideration by the court]; Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983); Applegate v. Top Associates, 415 F.2d 92, 97 (2d Cir. 1970); see also, Lujan v. Defenders of Wildlife, 497 U.S. 871 (1990). Rule 56(e) continues:

> Sworn or certified copies or parts therefor referred to in an affidavit shall be attached thereto.

The Meloy Affidavit makes reference to a various exhibits which were neither sworn to, nor certified. NYU presented no summary judgment evidence, within the meaning of Rule 56(e), as to what it claims to be the facts of this case.

The burden on the movant has two components: an initial burden which shifts to the non-moving party if carried; and an ultimate burden of persuasion which never shifts. NYU had the burden of informing the court of the basis for its motion and identifying those portions of its supporting evidence which demonstrates the lack of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Eastman Mach. Co. Inc. v. United States, 841 F.2d 469, 473 (2d Cir. 1988); The movant bears a heavy burden and summary judgment should not be granted unless it be clear that a trial is not necessary. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1985). Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. Adickes v. S.S. Kress & Co., 398 U.S. 144, 158-159 (1970). "[if]...there is any evidence in the record from any source from which a reasonable inference in the [non-moving

party's] favor may be drawn, the moving party simply cannot obtain summary judgment...." In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 258 (3d Cir. 1983), rev'd on other grounds sub nom. Matsushita Electronic Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

The United States Supreme Court, in the leading case of Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1985), discussed Federal Rule of Civil Procedure 56 in some depth. 477 U.S. at 247-252. The Supreme Court held, "...summary judgment will not lie if the dispute about a material fact is 'genuine', that is, if the evidence is such that a reasonable jury could return a verdict for the plaintiff." 477 U.S. at 248.

In the instant case no competent summary judgment evidence is submitted on the core issue of material fact in this case: whether appellant had the right to rely upon the statement of Dr. Hoffert that he would be permitted to re-take the qualifying examination an indefinite number of times, in effect, an unlimited number of times. (Appendix J-l). Dr. Hoffert had the apparent authority to bind NYU and to set policy for his department. Petitioner, in his submission opposing summary judgment, indicated a need to depose Dr. Hoffert and stated: "It now appears that plaintiff requires discovery..." and further claims that this discovery is necessary to determine Departmental policy. (See, Affirmation of Morgan Kennedy, reproduced in the Appendix H commencing at A74, particularly ¶ 51 at A95). This demand is a Rule 56(f) request and is a request for a continuance to take depositions.

Petitioner, by continuing in the program, relied on Dr. Hoffert's promise to his detriment.[4] The court, Healy v. Larsson, 67 Mis .2d 374, 42 A.D.2d 1051, aff'd, 35 N.Y.2d 653, held that a Chairman's statement of policy estopped the university from denying the existence of such a policy. This is particularly pertinent in the instant case as Chairman Hoffert admits in writing that he told appellant that he would be permitted to take the qualifying examination and indefinite, unlimited, number of times. (See, Appendiz J-1). These facts are outcome determinative, that is material and that which may affect the outcome within the meaning of the Supreme Court's Anderson opinion. 477 U.S. at 248 ["Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment."]

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[4] The District Court erred in finding that NYU had the right to change its policies with respect to matriculation requirements after a student has entered into a program and relied on those standards. See, e.g. Mahavogsanan v. Hall, 491 F.Supp. 381, 383 (N.D. Ga. 1975), aff'd, 529 F.2d 45 (5th Cir. 1976); see also, Idrees v. American University of the Caribbean, 546 F.Supp. 1342 (S.D.N.Y. 1986). NYU change in academic standards and its applying the new standards with respect to students already enrolled who relied upon the prior standards is arbitrary and capricious conduct. Morales v. New York University, 58 N.Y.2d 822 (1981), affirming the denial of summary judgment on the issue of NYU's having conducted itself in good faith.

In Idrees the Southern District of New York awarded damages to a student who had sued for misrepresentation actual damages, including tuition, fees and travel costs. See also, Spier v. Webster College, 616 S.W.2d 617 (Tex. 1981).

Anderson requires that there be "no genuine issue of material fact" as a condition precedent to summary judgment. 477 U.S. at 248 (emphasis in original). The Second Circuit has stated that "the district court in examining the record must resolve all ambiguities and draw all reasonable conclusions in favor the non-moving party." Gibson v. American Broadcasting Companies, Inc., 892 F.2d 1128, 1123 (2d Cir. 1989).

The District Court did not, as appears evident from the Memorandum Opinion and Order, consider this case -- when the Court very much belatedly turned its attention to the case -- in the light of Gibson v. American Broadcasting Companies, Inc., supra. This case presented a number of genuine issues of material fact which were not amenable to summary disposition. Among those issues are:

a. whether NYU was estopped from denying Petitioner the right to re-take the examination by reason of the admission by defendant Hoffert which admitted that appellant would be allowed "to take the qualifying Exams an indefinite number of times..." (Appendix J-1);

b. whether NYU as a matter of law and fact did not enter into a contract separate and apart from the contracts in the NYU's catalogs and bulletins by reason of the Hoffert statement;

c. whether the Bulletin in effect at the time of appellant's enrollment in the

program was the 1984 Bulletin or the 1986 Bulletin;

d. whether petitioner relied upon the 1984 Bulletin, as he claims, or on the 1986 Bulletin as incorrectly found by the District Court;

e. whether NYU was in breach for improperly using on one grader as opposed to two graders in grading petitioner's December 1989 examination as is required by the Rules for the Ph.D. in Applied Science;

f. whether NYU's urging petitioner to take and re-take the examination and permitting him to re-take the examination is a waiver of any claim that petitioner was barred from re taking the examination in 1990;

g. whether NYU (by Gabriel Miller) downgraded appellant's December 1984 examination from 60 (passing) to 51 (failing) [5];

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[5] Report from Purdue Professor Alan T. McDonald, Ph.D., P.E., which indicated that appellant should have been graded as passing the 1989 examination with 70%. (See, Appendix S). The question of whether appellant is fact passed in an issue of genuine material fact to be determined by the jury. Miller's downgrading appellant's examination is the equivalent of NYU's creating a misleading transcript after the commencement of this lawsuit. These incidents demonstrate that NYU did not properly exercise academic professional judgment and demonstrated bad faith. See, Latourette and King, "Judicial Intervention in Student-University Relationship: Due Process

h. whether NYU accepted petitioner as a fully matriculated doctoral candidate by its conduct in (1) stating he was a doctoral student and (2) by stating he was a PH.D. candidate in his unaltered transcripts[6];

i. whether NYU was estopped from denying that petitioner was a doctoral student on the basis of documents they issued;

j. NYU, in effect, created a false record by improperly changing their own records post the commencement of this action to bolster their misstatement that petitioner was not a doctoral student;[7]

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and Contract Theories", 65 University of Detroit Law Review, 199 at 225-226 (see cases cited at fn. p. 226) (1988).

[6] Appellees, substantially misrepresented appellant's status as a doctoral student and submitted altered transcripts which are contradicted by prior transcripts (Compare, Appendices Y and Y-1, reproduced in the Appendix commencing at A156 and Appendix Z, commencing at A169) and which are further contradicted by documents issued by NYU attesting to appellant's status as a doctoral student. (See, Appendices K though K-8, reproduced in the Appendix commencing at A112).

[7] NYU, on November 13, 1991, improperly altered appellant's official record. (See, Appendices Y, Y-1 and Z, cited in fn. 6). NYU, prior to the commencement of this case, had not altered the record and the fact of that alteration is an act which caused and continues to cause petitioner substantial damage.

and

k. NYU were estopped from denying Petitioner was a doctoral student and came under the rules in effect in the 1984 Bulletin.

Both the District Court and the Court of Appeals brushed these issues aside.

Petitioner, had Local Rule 3(g) been enforced or had the District Court made it clear that it was considering NYU Rule 12(b)(6) motion as a motion for summary judgment as required by Rule 12(b)(6), would have presented his counter-statement under Rule 3(g) and the question of issues of material fact could have been squarely addressed. The issues outlined above are "genuine" and material to the question of whether there was a contract between the parties, what its terms where, whether there was a breach, whether there was detrimental reliance and whether NYU acted arbitrarily and in bad faith. All these issues required a trial to be resolved. However, Chairman Hoffert's admission standing alone when taken with petitioner's continuing in the program, was sufficient to establish detrimental reliance and to demonstrate that a valid and enforceable contract existed between appellant and NYU where he would be permitted to retake the examination, in effect, until he passed. This issue, which was discussed by the District Court and which is resolved by the Court of Appeals holding the petitioner could not have justifiably relied upon the promise standing alone, should have been sufficient for a denial of summary judgment or a reversal of the District Court.

Under this Court's teaching in Anderson v. Liberty Lobby the above noted facts are outcome determinative and summary judgment was precluded. Anderson, supra, 477 U.S. at 248 ["Only disputes over facts that might affect the outcome of the suit under governing law will properly preclude the entry of summary judgment."].

NYU, post the commencement of this lawsuit, tampered with Keles NYU's transcripts and records so as to misrepresent appellant's status. The alteration of the records creates an issue of genuine material fact as to appellant's status as a doctoral student. Petitloner's original transcript was changed (see, fn. 6) and, in effect, a new transcript was "forged" for the purpose of misrepresenting appellant's status. NYU has relied upon a document they altered to suit their own ends, after their improperly alternation of the document post the commencement of litigation, misrepresented the key fact that petitioner, at all times, was a student in the doctoral program. This misrepresentation led to the Court of Appeals' misconception that petitioner was taking a test as part of his seeking admission to the doctoral program when. Petitioner, in fact, had completed his coursework with an "A" average (See, e.g., Appendix Y reproduced in the Appendix commencing at A156) and was taking an examination which was have resulted in his being granted the Ph.D. degree.

The misconception noted above is perhaps the single most damaging error on the part of the Court of Appeals and is the basis for the specious conclusion in the unpublished Summary Order that " Keles simply failed to present sufficient evidence to allow a factfinder to conclude that he had

matriculated in the doctoral program or had the right to retake his qualifying examination." (See, Appendix B at A6). This startlingly incorrect conclusion ignores the "unedited" transcripts and the various statements issued by NYU that petitioner was a doctoral candidate. (See, fn. 6 and Appendices K though K-8). The Court of Appeals, in dealing with the assertion that the following issues of material fact precluded summary judgment, brushed all those issues aside to focus on the mixed fact-law question of whether petitioner could rely on the promise made by the Chairman Hoffert that he could take the qualifying examination an unlimited number of times. (See, Appendix J-1 reproduced in the Appendix at All0). Dr. Hoffert states: "I recognize that in prior years I had informed you that you would be permitted to take the Qualifying Exams an indefinite number of times..." Id.

The Court of Appeals, however, did hold that there was a dispute which was material "to resolving the claim is the question of Keles's reliance on Hoffert's promise that he could retake his doctoral qualifying examination." (A6-7). The Court continued that this dispute "is not factual, it is legal: Keles essentially argues that this reliance on an existing contract between Keles and the University, or constituted a new contract between the parties." Id. The Court of Appeals resolved this dispute by hold that it was "unreasonable as a matter of law for Keles to rely upon Hoffert's statement" because NYU was free to revise it requirements without notice and such was stated in its Bulletin. The Court's final statement is "[e]ven if Hoffert promised what he is alleged to have promised, Keles should have known that the University could unilaterally

change the doctoral entrance requirements." (A7 (emphasis added)).

Petitioner, at all times material, was a matriculated student in NYU's doctoral program and was a candidate for a Ph.D. degree. Keles was not taking an "entrance" examination, as the Court ofAppeals appears to hold, but he was taking a qualifying examinationwhich was the final step in his being awarded a degree. Petitioner had completed all his course-work -- almost all of it at a grade of "A" -- and was on the verge of being awarded a Ph.D. degree. All that was necessary was that is fulfill the final requirement -- that he pass the qualifying examination with a grade of 60% and prepare a doctoral thesis.

The Court, substantially misconstrued Keles' status when it found that he did not establish he was a doctoral student (A9) and that the purpose of his examination taking was for "entrance" into the doctoral program. NYU submitted altered transcripts striking out Keles designation as a doctoral student and those documents are contradicted by prior original Registrar sealed transcripts. The Court's determination and NYU's claim is further contradicted by documents issued by NYU attesting to Keles' status as a doctoral student. NYU's falsified documents do not bear upon nor reflect Keles' pre-March 20, 1990 status as a doctoral student but reflect that NYU terminated his doctoral matriculation when they forbade his re-taking the

qualifying examination -- the last step before degree issuance.[8] It is, therefore, factually inaccurate for the Court to have concluded that was seeking "entrance" into the program or that he was not a doctoral student.

The Court's misconstruing Keles status as a doctoral candidate and, worse, apparently finding that he was seeking entrance to a program which he had -- in effect -- completed puts an entirely different coloration on this case. Keles, in fact, by completing his course work, by taking and retaking the qualifying examination had devoted literal years to obtaining his Ph.D. Hoffert's promise is that of the head of a department, cloaked with the actual or the apparent authority to bind NYU -- was something that a student of the department who had spent years in the department could reasonably rely, upon.[9] The Court's misapprehension of Keles matriculation status and the Court's erroneous determination that Keles was seeking to retake an "entrance" examination rather than to retake a qualifying examination -- the last hurdle in his being granted a degree by preparing and presenting a doctoral thesis --are significant errors which are outcome determinative under these facts.

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[8] NYU on November 13, 1991 improperly altered appellant's official record. (See, fn. 6). NYU, prior to the commencement of this case, had not altered the record and the question of that alteration is an act which causes Keles substantial damage. Since the alteration, from about November 13, 1991, Keles has been unable to present the "altered" transcripts or seek employment in the science or engineering field for which he is qualified.

[9] There is no doubt that Hoffert made the promise. (See, Appendix J-1).

THE QUESTION "RELIANCE" IS A MIXED QUESTION OF LAW AND FACT WHICH MAY NOT BE SUMMARILY DETERMINED

This Court of Appeals has held that issues of promissory estoppel -- the issue in this case being whether NYU was estopped from denying Keles an opportunity to retake the qualifying examination on the basis of Hoffert's promise -- is not amenable to summary disposition. "Summary judgment was not appropriate, however, on appellants' promissory estoppel claim. In New York, promissory estoppel has three elements: " 'a clear and unambiguous promise; a reasonable and foreseeable reliance by the party to whom the promise is made; and an injury sustained by the party asserting the estoppel by reason of his reliance.' " Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 793 (2d Cir.1986) (quoting Restatement (second) of Contracts Sec. 90 (1981)); at Reprosystem, 727 F.2d at 264." Arcadian Phosphates Inc. v. Arcadian Corporation, 884 F.2d 69, 73 (2d Cir. 1989) (opinion of Chief Judge Oakes reversing a grant of summary judgment dismissing a contract claim based on promissory estoppel).

Under this analysis it is irrelevant whether NYU retained the right to change the rules without notice and at will because Keles is not claiming a right under the Bulletin but a right which was promised him by NYU though his department head, Martin Hoffert. NYU was bound by the promise made by its agent Hoffert and a rule change does not invalidate that promise nor void the contract which arose by reason of Hoffert's promise.

Martin Hoffert had the actual apparent authority as chairman of the department to bind NYU. National Variety Artists,Inc., v. Mosconi, 169 Misc.982, 984, 9 N.Y.S.2d 498, 500 (1939); see also, Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 553, 416 N.E.2d 557, 435 N.Y.S.2d 556, 567 (1980)[10] (majority opinion of Judge Jones). The question of authority is a factual question not a legal question. Mosconi, supra., 169 Misc. at 984, 9 N.Y.S.2d 498.

The Court of Appeals has held in other cases that apparent authority is "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." Restatement (Second) of Agency Sec. 8 (1958) (emphasis added). Further, in order to create apparent authority, the principal must manifest to the third party that he "consents to have the act done on his behalf by the person purporting to act for him." Id. § 27. Second Circuit case law supports the view that apparent authority is created only by the representations of the principal to the third party, and explicitly rejects the notion that an agent can create apparent authority by his own actions or representations. Trustees of UIU Health & Welfare Fund v. New York Flame Proofina Co., 828 F.2d 79, 84 (2d Cir.1987);

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[10] In these cases the corporation was held liable for defamation based based on statements made by corporate officers, a far more serious finding of " binding" power than merely ruling that a departmental chairman has the actual or the apparent authority to commit his department and his university to permitting a student to re-take an examination.

Karavos Compania Naviera S.A. v. Atlantica Export Corp., 588 F.2d 1, 10 (2d Cir.1978).

Hoffert stood in relation to Keles and stood in relation to NYU as NYU's agent, he clearly was installed in a responsible position which is very much akin to that of an executive vice president in charge of a corporate division. When Hoffert set a departmental policy with respect to a student the student had a right to rely on that statement of policy just as an employee would have a right to rely on an executive vice president's promise on behalf of his corporation. If the promise made by the vice president were an exception to existing policy (or to policy which might come into existence at some subsequent time) that change in policy would be insufficient to impair the contract which arose at the time of the promise and the employee's subsequent reliance on that promise. See, Hallock v. State, 64 N.Y.2d 224, 474 N.E.2d 1178, 485 N.Y.S.2d 510 (1984).

Keles, in fact, passed one part of the qualifying examination (Appendix R at A131)[11] and, according to NYU's rules for "The Qualifying Examination Toward the PhD. in Applied Sciences"

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[11] Appendix R at A131 is a letter on NYU letterhead signed by Gabriel Miller the "Graduate Director" which states: "This is to confirm that Mr. Resat Keles has passed the Mathematical Sciences Qualifying Examination in Applied Science at New York University." Clearly Keles was both a doctoral candidate in the Ph.D. program and had passed 50% of the qualifying examination.

Keles had only to take the part he failed and, as Hoffert promised, he had a right to take the second portion an unlimited number of times.[12]

Indeed, the whole question of NYU's right to change its own rules unilaterally and then impose new rules on old students is, under these facts, a red-herring which obscured the fact that NYU by Hoffert had entered into a contract relied upon by Keles to permit him to retake the qualifying examination until he passed that examination. Hoffert's letter to Keles dated March 20, 1990 demonstrates both that he made the commitment, that he had or purported to have the authority to make the statement and the Keles -- for years -- had relied upon it. " I recognize that in prior years I had informed you that you would be permitted to take them Qualifying Exams an indefinite number of times... " NYU's change of policy or Hoffert's change of mind is insufficient, as a matter of law, to impair the contract which arose by the promise and Keles' demonstrated reliance on the promise that he would be permitted to take the examination an " indefinite", i.e., unlimited number of times.

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[12] There is reason to believe that petitioner actually passed the Qualifying Examination and that his claims as to mis-grading and/or improper grading have a considerable degree of substance. (See, Appendix S, Report of Purdue Professor Alan T. McDonald, commencing at A134). Professor McDonald's view the the examination is that the passing grade of 60 was met and exceeded and, indeed, the differential between NYU's grading and McDonald's grading of 14 points, nearly a 30% differential, is a reasons to question both the grading of the exam and the appropriateness of NYU's grading procedure which petitioner had raised in the District Court and again in the Court of Appeals.

The Second Circuit erred in determining the questions of motive and intent which lay behind Hoffert's statement and petitioner's subsequent conduct as such issues are not amenable to summary adjudication. See, e.g., Cedallo v. Int'l Ass'n of Bridge & Structural Iron Workers Local Union No. 1, 603 F.2d 7 (7th Cir. 1979).

THE DISTRICT COURT ERRED IN PERMITTING NYU TO FILE A MOTION OUTSIDE THE TIME PRESCRIBED BY THE SO-ORDER STIPULATION

The parties entered into a Stipulation which extended NYU's time to answer the complaint in this action up to and including December 13, 1991. This Stipulation was subscribed by counsel for both parties on or about November 19, 1991 and was "so ordered" by the District Court on December 6, 1991 and entered on the docket. (See, Appendix I reproduced at A107. NYU breached the agreement evidenced by the "so ordered" Stipulation and did not timely answer or move. Petitioner had relied upon the Stipulation and did not seek to enter a default judgment and petitioner was entitled to have the Stipulation enforced by the District Court because he relied upon it to his detriment and because NYU's conduct was unexplained and unexcused.

NYU Should Not Have Been Relieved of The Default

The parties' Stipulation meets each and every criteria set out by the decisional law of New York and NYU was bound by the contract they made and which the Court " so ordered ".

NYU had a duty to answer or to move in this case by December 13, 1991 and simply omitted to do so. The Stipulation was entered between the parties on or about November 19, 1991 and it was "so ordered" by Judge Kram on December 6, 1991 is reprinted in the Appendix at A107.

The District Court had no basis for disturbing or modifying the "so ordered" Stipulation or for vacating NYU's default under the Stipulation. See, Hallock v. New York State,65 N.Y.2d 224 and discussion of Fed.R.Civ.Pro. 55(c), infra.

A stipulation is a contract between the parties who have entered into the stipulation and, as such, it is enforceable as a contract. The underlying principles of contract are principles which, under the Erie Doctrine, are to be taken from the decisional law of the State in which the District Court sits and the District Court is bound to apply those common law contract principles.[13] In New York "[t]o be enforceable, a stipulation must be (1) made in open court, (2) written and subscribed, or (3) reduced to a court order and entered (see, CPLR 2104)." Conlon v. Concord Pools, Ltd., 170 A.D.2d 754, 565 N.Y.S.2d 860, 861. A stipulation relating to a pertinent litigation matter entered into in under the auspices of a court, reduced to writing and "so ordered" is enforceable as a contract binding on all parties thereto and is governed by common law contract principles for its interpretation and effect. See, e.g. State of New York v. Warren Brothers Co., 190 A.D.2d 728, 730, 593 N.Y.S.2d 308.

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[13] See, Erie R.R. Co. v. Tompkins, 304 U.S. 64.

Just "[a]s in a matter where parties seek enforcement of a contract, the court has the responsibility of effectuating the true intent of the parties". Furgang v. Epstein, 106 A.D.2d 609, 483 N.Y.S.2d 103.

A stipulation is enforceable as a binding contract if it is definite and complete upon its face, Term Indus. v. Essbee Estates, 88 A.D.2d 823, 451 N.Y.S.2d 128. The parties to a stipulation may have it set aside only for reasons which would allow a contract to be set aside, such as fraud, collusion, mistake, or accident. Hallock v. State of New York , 64 N.Y.2d 224, 485 N.Y.S.2d 510, 477 N.E.2d 1178. Strict enforcement of stipulations serves the interest of efficient dispute resolution. Privin v Landolfi, 191 A.D.2d 485, 486, 596 N.Y.S.2d 707; Gotard v. Gotard, 165 A.D.2d 824, 825, 560 N.Y.S.2d 204.

The District Court, in the absence of a motion pursuant to Fed.R.Civ.Proc. 55(c) and a consideration of the factors applicable to Rule 55(c) motions and the common law requirements for setting aside a Stipulation. See, e.g., Abraham v. Volkswagen of America, Inc., 795 F.2d 238, 248-249 (2d Cir. 1986); Meehan v. Snow, 652 F.2d 274, 277 (2d Cir. 1981). In the instant case such a Rule 55(c) motion was never made and NYU's delay in seeking relief is a further ground for denying relief from the Stipulation. Chandler Leasing v. UCC, Inc., 91 F.R.D. 81 (N.D. Ill. 1981).

The District Court Should Not Have Considered Appellees' Motion

NYU's Failure to File a Local Rule 3(g) Statement Is a Fatal Defect and Prejudiced Appellant

NYU failed to file the mandatory[14], statement under Local Rule 3(g) of what material facts were undisputed and the motion, on that ground alone, should not have been considered or been denied. Zeno v. Cropper, 650 F.Supp. 138, 139 (S.D.N.Y. 1986); Harvey Cartoons v. Columbia Pictures Indus., Inc., 645 F.Supp. 1561, 1571 n. 10 (S.D.N.Y. 1986); Gear Inc. v. L.A. Gear California, Inc., 637 F.Supp. 1323, 1333 (S.D.N.Y. 1986); George v. Hilaire Farm Nursing Home, 622 F.Supp. 1349, 1353 (S.D.N.Y. 1985).

In this case the lack of such a statement severely prejudiced petitioner because he was not properly placed on notice of the facts which NYU claimed were uncontested nor was he accorded, in light of all the other circumstances which adversely affected petitioner's presentation before the District Court, a full opportunity to controvert those facts. See, e.g., Grove v. Mead School District, 753 F.2d 1528 (9th Cir. 1985).

The District Court's Failure to Give Notice Required by Fed. R. Civ. Pro. 12 (b) (6) Prejudiced Appellant

Petitioner was entitled to specific notice that the Court was treating appellees' Rule 12 (b) (6)

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14 Dusaneko v. Maloney, 726 F.2d 82, 83 (2d Cir. 1984).

motion as one for summary judgment so that appellant could have had the fair opportunity to interpose evidentiary materials or make a showing under Fed.R.Civ.Pro. 56 (f). The notice contemplated by Rule 12 (b) (6) is required so that a reasonable opportunity may be afforded to present evidence relevant to the motion. United States v. One Colt Python .357 Cal. Revolver, S/N 7033461 w/Holster, 845 F.2d 287, 289 (11th Cir. 1988); Davis v. Bryan, 810 F.2d 42, 45 (2d Cir. 1987); Mack v. South Bay Beer Distributors, Inc., 798 F.2d 1279, 1282 (9th Cir. 1986).[15] NYU's submission did not properly place petitioner on notice that materials outside the pleadings would be considered on the motion because NYU's submission did not comply with the requirements of Fed.R.Civ.Pro. 56(e). These omissions and the prejudice flowing from them is further compounded by the lack of a Local Rule 3(g) statement and the self-evident incapacities of petitioner's.[16]

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[15] But see, In re G & A. Books Exhibitors Inc. v. Stern, 770 F.2d 288, 295 (2d Cir. 1985), cert. denied sub nom, M.I.M. Exhibitors, Inc. v. Stern, 475 U.S. 1015 (1986).

[16] Morgan Kennedy's presentation in the District Court, Appendix H commencing at A94, is a travesty. Mr. Kennedy, on the basis of his papers, is completely unfamiliar with the usages of federal practice, ignorant of federal procedure and unmindful of federal authorities. Mr. Kennedy does not refer to Rule 56. Mr. Kennedy does not cite a single federal authority. Mr. Kennedy does not even affirm properly as is required by 28 U.S.C. §1746. Petitioner, under the circumstances, could not fairly present his case to the District Court.

THE COURTS OF APPEALS ARE IN APPARENT CONFLICT AS TO WHETHER RELIANCE ON A REPRESENTATION IS QUESTION OF FACT TO BE DETERMINED BY THE JURY OR IS A MATTER OF LAW TO BE DETERMINED BY THE COURT

A SPLIT AS TO CONTRACT

The Court of Appeals, in the instant case, decided as a matter of law that petitioner's reliance on Hoffert's statement was "unreasonable" because Hoffert's statement was at variance with the position later taken by NYU in its student bulletin. The Second Circuit brushed this issue aside in affirming the District Court's grant of summary judgment The Eighth Circuit and the Tenth Circuit have taken differing positions and held, in employee compensation cases, that the existence and the nature of a statement was an issue of fact for the jury. Stahl v. Sun Microsystems, Inc., 19 F.3d 533 (10th Cir. 1994); Kent Jenkins Sales Inc. v. Angelo Brothers Company, (8th Cir. 1986).

In Stahl an employer had apparently retaliated against an employee on the basis of the employees refusal to reveal to the employer classified information that the employee had become privy to in the course of servicing her accounts after obtaining a United States Security Clearance. Stahl v. Sun Microsystems, Inc., 19 F.3d at 535. The employer had caused the employee to obtain the clearance so as to facilitate her work with accounts such as Hughes Aircraft. Id. The 10th Circuit held, in the face of an argument that there was no contract or that whatever was claimed as a contract to

indefinite and vague was a question for the jury was to what, if anything, had been agreed. Id. at 536.

In a case somewhat closer to the instant case, the Eighth Circuit held that an employer's alleged promise not to fire an employee except for cause constituted an issue of material fact for the jury. Kent Jenkins Sales Inc. v. Angelo Brothers Company, 804 F.2d 482 (8th Cir. 1986). The Eight Circuit reversed a directed verdict at the close of the plaintiff's case holding that course of conduct, statements between the parties and custom and practice created an issue which constituted a jury question as to whether there was a contract and what was its nature. Id. at 485.

A SPLIT AS TO ESTOPPEL

The Second Circuit, in this case, decided the question of whether Hoffert's promise estopped NYU from denying petitioner a re-examination was a question it could decide as a matter of law in a left-handed manner by holding the reliance was not justifiable.

In this it joined the 11th Circuit which holds that estoppel issues are matters of law. Marine Transport Services Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133 (11th Cir. 1994), compare, Twin City Fire Insurance Co. v. Philadelphia Life Insurance Co., 795 F.2d 1417 (9th Cir. 1986), where the Ninth Circuit hold that the question of estoppel is a jury issue. Burnside-Ott Aviation Training Center Inc. v. The United States, 985 F.2d 1574 (Fed. Cir. 1993).

CONCLUSION

For the reasons set forth above, petitioner respectfully pray that a writ of certiorari be granted to review the judgments of the Court of Appeals for the Second Circuit, and petitioner be accorded such other and further relief as the court deems in the interest of justice.

Dated: New York, New York
August 31, 1995

Respectfully submitted,

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(Counsel of Record)
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212-513-1749

Attorney for Petitioner

APPENDICES

APPENDIX A

UNITED SATES OF COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED SATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of June one thousand nine hundred and ninety-five.

REHEARING ORDER

UNITED STATES COURT OF APPEALS
FILED
JUNE 6 1995
GEORGE LANGE III ,CLERK
SECOND CIRCUIT

Dkt No: 94-7461

Keles,

Plaintiff-Appellant,

v.

New York University,

Defendant- Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant
Resat Keles.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III,
Clerk

By: SIGNED

Carolyn Clark Campbell,
Chief Deputy Clerk

APPENDIX B

91-Civ-7457
KRAM

RKW

UNITED SATES OF COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the *13th* day of *April* one thousand nine hundred and ninety-five.

Present: Honorable Ralph K. Winter,
Honorable Pierre N. Leval,
Circuit Judges.*

UNITED STATES COURT OF APPEALS
FILED
APRIL 13, 1995
GEORGE LANGE III ,CLERK
SECOND CIRCUIT

*The third member of the panel having having recused himself, the appeal has accordingly been heard and decided pursuant to this court's Rule 0.14 by the remaining two judges of the panel, who consitute a quorum.

ORDER
94-7461

94-7461

RESAT KELES,

Plaintiff-Appellant,

V.

NEW YORK UNIVERSITY; MARTIN HOFFERT,Doctor;GABRIEL MILLER, Doctor;FERHAD KAZEMI,Doctor;and JOHN BRADEMAS, as President of New York University,

Defendant- Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause of action came to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Docket # 94-7461
Page 2 of 7

Resat Keles appeals Judge Kram's grant of summary judgment dismissing Keles's claims for breach of contract and for fraud against New York University (the "University"), Martin Hoffert, Gabriel Miller, Farhad Kazemi, and John Brademas.

On appeal, Keles contends that: (i) the district court improperly drew inferences in favor of appellees; (ii) the district court erred by finding that appellees had acted reasonably in accommodating Keles when the University changed its rules; (iii) appellees failed to abide by a scheduling order of the district court; (iv) the University acted arbitrarily in grading Keles's examination; (v) the university failed to obtain consent from the State of New York before changing the rules governing doctoral qualifying examinations; (vi) appellees summary judgment motion was premature; (vii) the district court should not have considered appellees' motion for summary judgment because they failed to file a statement of undisputed material facts; (viii) the district court failed to give him proper notice that it would treat appellees' 12(b)(6) motion as a motion for summary judgment; and (ix) there exist genuine issues of material fact precluding summary judgment.

First, Keles contends that the district court improperly drew inferences in favor of appellees and decided disputed issues of fact, although on a motion for summary judgment, "[a]ll reasonable inferences and any ambiguities are drawn in favor of the nonmoving party." Thompson v. Gjivoje, 896 F.2d 716, 720 (2d Cir. 1990). We disagree. The nonmovant must "do more than simply show that there is

some metaphysical doubt as to the material facts." Matsushita Elec. Indus . Co. v . Zenith Radio Corp., 475 U. S . 574 , 586 (1986) . Rather, enough evidence must be put forward by the nonmoving party to permit a jury to return a verdict in its favor on the issue in dispute. See Anderson v . Liberty Lobby ,Inc., 477 U. S. 242 , 248 (1986) . Keles does not point to any genuine issue of material fact precluding summary judgment, and the district court did not draw any improper factual inferences against Keles. Keles simply failed to present sufficient evidence to allow a factfinder to conclude that he had matriculated in the doctoral program or had the right to retake his qualifying examinations.

Second, Keles contends that the district court erred by finding, on a motion for summary judgment, that appellees had acted reasonably in accommodating Keles when the University changed the rules governing the number of times the doctoral qualifying examinations could be taken. Keles cites no authority for his claim that appellees, as part of their alleged contractual obligations, were required to meet the standard of reasonableness in determining whether to expel Keles for academic failure. However, even were such a requirement to exist, we believe that the evidence put forward by Keles would not, as a matter of law, permit a factfinder to conclude that appellees acted unreasonably.

Third, Keles contends that the district court should not have entertained appellees' summary judgment motion because appellees failed to abide by the district court's scheduling order, which

appellant repeatedly refers to as a "stipulation." We believe that the district court has wide discretion in enforcing its scheduling orders, and that in this case the district court did not abuse its discretion by granting appellees more time to file their summary judgment motion. We note that the decisions of this court cited by Keles in support of this claim concern factual stipulations, not agreements between adversarial parties on filing deadlines.

Fourth, Keles contends that the University acted arbitrarily in grading his 1989 examination. Keles alleges breach of contract and fraud; arbitrary exam-grading is not an element of either. We therefore decline to evaluate Keles's math exam.

Fifth, Keles contends that the University failed to obtain consent from the State of New York's Education Department before changing the number of times that doctoral qualifying examinations could be taken. This allegation, even if true, is irrelevant to establishing breach of contract or fraud.

Sixth, Keles contends that appellees' summary judgment motion was premature, and that Keles requires additional discovery. The amount of time given for discovery is within the discretion of the district court, and we do not believe that the district court abused its discretion in this case. See Contemporary Mission, Inc. v. United States Postal Serv., 648 F.2d 97, 105 (2d Cir. 1981) (finding that "the district court acted well within its discretion in preventing the plaintiff from burdening the defendants with a needless round of discovery in this frivolous lawsuit").

Seventh, in his reply brief, Keles contends that the district court should not have considered appellees' motion for summary judgment because they failed to file, pursuant to Local Rule 3(g), a statement of undisputed material facts. Rule 3(g) provides that the failure of a moving party to comply with the rule "constitutes grounds for denial of the motion." This language is permissive, not mandatory, cf. Zeno v. Cropper, 650 F. Supp. 138, 139 (S.D.N.Y. 1986) (discussing administration of Rule 3(g)), and, given the frivolous legal bases of Keles's claims, the district court did not err by considering appellees' motion.

Eighth, in his reply brief, Keles contends that the district court failed to give him proper notice that it would treat appellees' Rule 12(b) (6) motion as a motion for summary judgment. The claim is frivolous. The notice of motion clearly asked that the motion be considered, in the alternative, as a motion for summary judgment. Keles was thus on notice that summary judgment might be granted.

Ninth, in his reply brief, Keles renews his argument that there existed genuine issues of material fact precluding summary judgment. Although this argument was made in Keles's pro se opening brief, in his reply brief Keles, through counsel, presents different facts supposedly in dispute. With a single exception, we do not believe that any of these factual disputes are material to resolving Keles's claim, so we need not address the laundry list of facts allegedly in dispute.

The dispute that is material to resolving the claim is the question of Keles's reliance on Hoffert's promise that he could retake his doctoral qualifying examination. However, this dispute is not factual, it is legal: Keles essentially contends that his reliance upon Hoffert's statement either modified an existing contract between Keles and the University, or constituted a new contract between the parties. Assuming the existence of a contract, and assuming that Hoffert's statement modified that contract, it was still unreasonable as a matter of law for Keles to rely upon Hoffert's statement because the University was free, as explained in the New York University Bulletin, to change its requirements without notice at any time at the discretion of the administration. Even if Hoffert promised what he is alleged to have promised, Keles should have known that the University could unilaterally change the doctoral entrance requirements.

We therefore affirm.

SIGNED
Hon.Ralph K. Winter,U.S.C.J.

SIGNED
Hon.Pierre N. Leval,U.S.C.J.

N.B.THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

APPENDIX C

DECISIONS

MEMORANDUM OPINION AND ORDER DATED APRIL 6, 1994 (192-210)

91 Civ. 7457 (SWK)
MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, and DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FARHAD KAZEMI, and JOHN BRADEMAS, as president of New York University,

Defendants.

APPEARANCES:
For Plaintiff:
Morgan Kennedy
133 East 15th Street
New York, New York 10003
By: Morgan Kennedy

For Defendants:
S. Andrew Schaffer
70 Washington Square South
New York, New York 10012
By: S. Andrew Schaffer, Ada Meloy

SHIRLEY WOHL KRAM, U.S.D.J.

In this breach of contract action against New York University (the "University"), its former president, John Brademas, and three faculty members Martin Hoffert, Gabriel Miller and Farhad Kazemi (collectively "defendants"), plaintiff Resat Keles ("Keles") challenges his dismissal from the doctoral program at defendant University. Defendants now move, pursuant to Rules 12(b) (6) and 56(b) of the Federal Rules of Civil Procedure, to dismiss on the grounds that the complaint's (1) first and second causes of action breach of contract (a) fail to state a claim for relief under New York law; and (b) are barred by the applicable statute of limitations New York Civil Practice Law and Rules ("NYCPLR") § 217 (McKinney's 1991); and (2) the third cause of action for fraud (a) fails to state a claim with the requisite particularity under Federal Rule of Civil Procedure 9(b) and New York law; and (b) is barred by the statute of limitations, NYCPLR §§ 203 (f) and 213 (8) . For the reasons set forth below, the defendants' motion is granted, and the complaint dismissed.

BACKGROUND[1]

In October 1983, Keles, a thirty-three year old student at Manhattan College, applied for admission

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[1] Unless otherwise indicated, this statement of relevant facts is derived from the Affidavit of Ada Meloy, sworn to on Feb. 6, 1992 (the "Meloy Aff."); the Affirmation of Morgan Kennedy, dated Feb. 21, 1992 (the "Kennedy Aff."); the Affidavit of Resat Keles, sworn to on Feb. 20, 1992 (the "Keles Aff."); and the Verified Complaint.

to the doctoral program in Applied Science at New York University's Graduate School of Arts and Science ("GSAS").[2] By letter dated November 15, 1993, GSAS's director of admissions notified Keles that, "due to the rigorous entrance requirements of the Department of Applied Science," Keles was admitted to the master's program, but not the doctoral program. See Letter from Jennifer Caplan, Director of Admissions and Financial Aid, to Resat Keles, annexed to the Meloy Aff. as Exh "C." The letter also indicated, however, that, if Keles's academic performance proved satisfactory, he might be able to transfer to the doctoral program.

In the Spring of 1984, Keles enrolled in the master's program in Applied Science. On June 6, 1985, after three semesters of study, he received his Master of Science Degree. Keles continued taking courses in the Department of Applied Science (the "Department"), however, throughout the 1985-87 academic years. After completing his last course in June 1987, Keles maintained matriculation by paying a fee which entitled him to use the library and other University facilities from September 1987 through June 1990.

A. The Ph.D. Qualifying Examination

According to the 1986-1988 GSAS Bulletin, to qualify as a matriculant of a Doctor of Philosophy ("Ph.D.") in the Department of Applied Science, a candidate must pass, no later than 40 credits beyond the

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[2] GSAS is one of fourteen schools and divisions of New York University. The Department of Applied Science, within GSAS, offers advanced courses in energy and atmospheric science and engineering to prepare for careers in scientific and technical research, education, business or public administration.

baccalaureate, a combination of written and oral qualifying examinations in three of the following six areas: two exams in either basic mathematical science, basic physical and chemical sciences, or basic social science, and one oral exam in either the energy science or atmospheric science concentrations in Applied Science. The GSAS Bulletin indicates further that (1) with the approval of the committee on graduate studies, a written exam may be substituted for the preferred oral examination in Applied Science; and (2) the written examinations may be taken no more than two times.[3] Upon receipt of a passing grade on the qualifying examinationS, the student is admitted to Ph.D. candidacy in the Department of Applied Science.

It is undisputed that, in November 1984, during Keles's second semester in the master's program in Applied Science, he attempted to pass the written Ph.D. qualifying examinations in basic mathematical and basic physical and chemical sciences. By letters dated December 14, 1984 and May 14, 1985, Keles was notified that he had failed both exams. The parties disagree as to what then transpired.

Defendants contend that, in 1987, having completed his coursework, Keles attempted to have the results of his 1984 examinations changed from "failure" to "passing." After review by Department faculty, Keles was advised that the failing grades would not be changed, but that he could retake the exams. Accordingly, in November 1987, Keles retook

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[3] Previously, as reflected by the 1984-1986 GSAS Bulletin, the qualifying examinations could be taken three times.

the basic mathematical science examination and passed.

Defendants next contend that, at Keles's request, the Department faculty met at least twice more in 1988 to review Keles's 1984 physical and chemical sciences examination. After each meeting, Keles was notified, by letters dated February 11 and March 24, 1988, that his failing score would not be changed.

Defendants allege further that, in July 1988, Keles petitioned Dr. Benjamin Bederson, Dean of GSAS, for permission to take the oral qualifying examination in Applied Science. Keles was advised that he first had to pass the written exam in basic physical and chemical sciences, and that he should retake the exam when it was offered in the Fall. By letter dated October 14, 1988, Keles indicated that he would retake the physical and chemical sciences examination.

Keles failed to retake the examination the next two times it was offered, however, waiting for more than a year to retake the qualifying exam in basic physical and chemical sciences. When he finally retook the test in December 1989, he again failed.

Keles's version of events is as follows. Keles alleges that, althouqh he passed the examination in physical and chemical sciences in November 1984,[4]

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[4] This claim is directly contradicted, however, by a letter dated December 14, 1984 from the Director of Graduate Studies to Keles, indicating that "[Keles had] not passed either the Mathematics or the Physical Science part of the Ph.D. Qualifying Exam . . . ." See letter from Barry Rugg, Director of Graduate Studies, to Resat Keles of 12/14/84, annexed to the Meloy Aff. as Exh. "F." As an alternative, Keles also alleges that, although he passed the physical and chemical sciences exam, the defendants changed his

he was forced to retake the exam after the Department lost his examination booklet. Thereafter, at the Department's urging, Keles claims that he retook the examination in April 1989, and failed. According to Keles, at about this same time, the Department changed its rules so as to preclude students from taking qualifying examinations more than two times. As a result, in March 1990, Keles was notified that he was being denied any further opportunity to retake the written qualifying examinations. With respect to his mathematics examination, Keles alleges that, although he initially failed the exam, he was notified, by letter dated January 27, 1988, that his grade had been reevaluated, and that he had passed.

B. Termination of Keles standing

As of March 1990, six years after Keles enrolled in the master's program in Applied Science and over five and one-half years after he first attempted to qualify for the Ph.D. program, Keles had only passed one of the three qualifying examinations required to matriculate in the Ph.D. program. Consequently, on March 8, 1990, the Department faculty voted to terminate Keles's standing as a graduate student.

On August 1, 1990, in apparent dissatisfaction with the Department's decision to terminate his standing, Keles filed a 48 point grievance alleging "breach of contract, mistakes, and misrepresentations" against the Department of Applied Science, Its Chairman, Martin Hoffert, and

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passing grade of 60 to a failing grade of 51 Keles. Aff. at ¶ 19. The Court finds no support for either of these contentions.

its director of graduate studies Gabriel Miller. See Affidavit of Resat Keles, sworn to on Aug. 1 1990, annexed to the Meloy Aff. as Exh. "O." Specifically, Keles alleged that (1) he passed the qualifying examination in physical and chemical sciences in November 1984; (2) having passed the mathematics examination, he was entitled to take the other qualifying examinations orally; (3) the Department violated University procedures by not allowing him to retake the physical and chemical sciences examination in May 1990; and (4) the faculty's vote to limit the number of times a student could sit for

the written qualifying examinations did not apply to Keles, as he was admitted to the Department before the change in rules occurred.

In August 1990, following established grievance procedures, the Dean of GSAS ruled in favor of the Department and faculty, finding that (1) there was not one shred of evidence that Keles passed the physical and chemical sciences examination; (2) Keles was not entitled to take an oral examination; and (3) the Department had the right to modify its rules to improve academic standards. In upholding the Department's decision, the Dean stated:

> I believe the department has shown its good faith by affording you repeated opportunities to retake the examination, opportunities which you chose not to use, as well as by convening as a committee of the whole to review your answers to the Physical and Chemical Sciences exam. I find there has been no violation of university rules and procedures and therefore there is no basis for your grievance.

See Letter from Farhad Kazemi, Acting Dean of GSAS, to Resat Keles of 8/9/90, annexed to the Meloy Aff. as Exh. "P." Thereafter, by letters dated August 20, 1990 and February 28, 1991, this decision was reconfirmed by both the Acting Dean, Farhad Kazemi, and the Vice President and General Counsel, S. Andrew Schaffer.

C. The Instant Action and Pending Motion

In November 1991, eighteen months after being notified of the Department's decision to terminate his standing as a graduate student, Keles filed the instant action alleging, in effect, two causes of action: (1) breach of an implied contract "by denying plaintiff his right to re-take his physical and chemical science qualifying examination an indefinite number of times" (Complaint at ¶ 45), "by terminating [him] from its graduate school in 1990" (Complaint at ¶ 46), and by refusing to administer the qualifying examination in basic physical and chemical sciences to him orally (Complaint at ¶¶ 70-72); and (2) fraud (Complaint at ¶ 98).

Defendants now move to dismiss on the grounds that the complaint fails to state a cause of action or, in the alternative, is barred by the applicable statutes of limitations. Specifically, defendants contend that (1) the academic judgment to terminate Keles was not arbitrary or lacking in good faith, but rather, a just decision based on Keles's academic record and test scores; (2) the allegations of fraud are lacking in particularity and contrary to fact; (3) the action should have been brought as an Article 78 proceeding and thus, is time barred under the four-month statute of limitations; and (4) the cause of action for fraud is also time-barred by sections 213(8) and 203(f) of the NYCPLR.

DISCUSSION

I. Summary Judgment Standard[5]

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. Adickes v. S.H. Kress&Co., 398 U.S. 144, 157 (1970). The movant may discharge this burden by demonstrating to the Court that there is an absence of evidence to support the non-moving party's case on which that party would have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). In testing whether the movant has met this burden, the Court must resolve all ambiguities against him. Lopez v. S.B. Thomas, Inc., 831 F.2d 1184, 1187 (2d Cir. 1987) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).

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[5] Although the Court will treat the instant motion as a motion for summary judgment, both parties have violated Local Rule (3)(g), which requires a short and concise statement of the material facts. Failure to submit such a statement constitutes grounds for denial of the motion. In addition, Keles violated Local Rule 3(b) by failing to serve and file an answering memorandum, divided by appropriate headings, setting forth the points and authorities relied upon in opposition to defendants' motion. Failure to oomply with Local Rule 3(b) may be deemed sufficient cause for granting the motion for summary judgment by default.

The non-moving party then has the burden of coming forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Thus, speculation, conclusory allegations and mere denials are not enough to raise genuine issues of fact. To avoid summary judgment, enough evidence must favor the non-moving party's case such that a jury could return a verdict in his favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

II. The Quasi Contract Claim

In his first cause of action, Keles alleges that, once he enrolled in the Ph.D. program, he had an educational contract with New York University as set forth in the Department's 1983 rules for qualifying examinations (the "Guidelines") and the GSAS Bulletin for 1984-1986. Keles alleges further that New York University breached the educational contract by (1) denying him his right to retake the physical and chemical sciences qualifying examination; (2) terminating him from the graduate school; and (3) retroactively applying a new rule limiting the number of times a Ph.D. candidate may sit for the qualifying examinations.

In the second cause of action, Keles maintains that New York University's 1990 proposal and registration documents, submitted to the New York State Education Department to obtain degree granting status, indicate that the qualifying examinations for the Ph.D. program could be administered orally or in written form. Keles alleges further that these

proposals endowed him with a contractual right to be tested orally, which was breached when defendants required that he take a written physical and chemical sciences examination.

New York courts have recognized that once a student is admitted to a university, an implied contract can arise between the student and the university. Nieswand v. Cornell Univ., 692 F. Supp. 1464, 1470-71 (N.D.N.Y. 1988); Vought v. Teachers College, Columbia Univ., 127 A.D.2d 654, 511 N.Y.S.2d 880, 881 (2d Dep't 1987); Auser v. Cornell Univ., 71 Misc.2d 1084, 337 N.Y.S.2d 878, 882 (N.Y. Sup.Ct. 1972).

> When a student is duly admitted by a private university, secular or religious, there is an implied contract between the student and the university that, if he complies with the the terms prescribed by the university,he will obtain the degree which he sought.The university cannot take the student's money, allow him to remain and waste his time in whole or in part (because the student might regard it as a waste of time if he does not obtain the degree), and then arbitrarily expel him or arbitrarily refuse, when he has completed the required courses, to confer on him that which it promised, namely, the degree.

Carr v. St. John's Univ., New York, 17 A.D.2d 632, 231 N.Y.S.2d 410, 413 (2d Dep't), aff'd, 12 N.Y.2d 802, 235 N.Y.S.2d 834, 187 N.E.2d 18 (1962); but see Tedeschi v. Wagner College, 49 N.Y.2d 652, 427 N.Y.S.2d 760, 763, 404 N.E.2d 1302 (1980) (noting that the "[c]ontract theory is not wholly satisfactory," as the contract is assumed, rather than proved). "The rights and obligations of the parties, as contained in the

university's bulletins, [become] a part of the parties' contract." Prusack v. State, 117 A.D. 2d 729, 498 N.Y.S.2d 455, 456 (2d Dep't 1986); see also Auser v. Cornell Univ., 337 N.Y.S.2d at 882 (University's "General Informational Bulletin" contained terms of the contract).

In support of his breach of contract claim, Keles has submitted the Guidelines for the qualifying examination toward a Ph.D. in Applied Science, dated March 1983, and the 1984-1986 GSAS Bulletin.[6] Relying on the provisions of the 1983 Guidelines and 1984-1986 Bulletin, Keles claims that he was entitled to take the qualifying examinations at least three times or "as often possible." Kennedy Aff. at ¶45. What Keles fails to realize, however, is that, assuming the 1983 Guidelines apply, he did not satisfy the other requirements set forth for Ph.D. candidacy. Specifically, the 1983 Guidelines indicate that the qualifying written examinations must be taken within a particular time frame, "no later than 36 credits beyond the baccalaureate," and that the oral examination which follows "must be taken no [later] than 48 credits beyond the baccalaureate." In addition, the Guidelines provide:

> Written and oral examinations may be taken as often as possible but must be completed within two years after the first attempt of the written examination. A student passing the first written examination, and failing the second is required to repeat only the latter, however, he must do so within the two year period.

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[6] Keles claims that the 1986-1987 Bulletin is inapplicable to him because, by the time it was published in March 1987, he did completed more than the 72 credits needed for the Ph.D.

See Guidelines, annexed to the Keles Aff. as Exh. "D."

Keles first failed the examinations in November 1984. Thus, according to the 1983 Guidelines, he had until November 1986 to pass. Keles did not pass the basic mathematical sciences examination until November 1987. He never passed the physical and chemical sciences examination, which he did not retake until December 1989. Accordingly, by not passing the examinations at the proper stage of his studies, Keles did not fulfill the requirements of the 1983 Guidelines, and thus, breached his part of the contract. See Hammond v. Auburn Univ., 669 F. Supp. 1555, 1562 (M.D. Ala. 1987) ("[i]mplicit in a student's educational contract with the University is the duty of the student to comply with the University's rules and regulations"), aff'd without op., 858 F.2d 744 (llth Cir. 1988), cert. denied, 489 U.S. 1017 (1989); Merrow v. Goldberg, 672 F. Supp. 766, 774 (D. Vt. 1987). As Keles breached the contract by not passing both exams in two years, the defendants are similarly relieved of their obligation to allow Keles to retake the physical and chemical sciences qualifying examinations.

Second, the Court finds that the 1986-1988, rather than the 1984-1986 Bulletin, applies to Keles. The 1986-1988 Bulletin reduced the number of times a candidate could sit for the qualifying examinations from three, as set forth in the 1984-1986 Bulletin, to two. Keles contends, however, that the 1986-1988 regulations do not bind him because they went into effect after he had completed the necessary coursework for the Ph.D. This argument is without merit. As Keles continued taking the Ph.D. qualifying exams in 1987 and 1989, the 1986-1988 regulations applied to him as well.

Moreover, the Court is of the opinion that, implicit in the University's general "contract" with its students is a right to change the University's academic degree requirements if such changes are not arbitrary and capricious.
Mahavongsanan v. Hall, 529 F.2d 448, 450 (5th Cir. 1976) (change in graduation requirements not a breach of contract as change constituted proper exercise of university's educational responsibilities); Easley v. University of Michigan Bd. of Regents, 627 F. Supp. 580, 585-86 (E.D.Mich. 1986) (finding frivolous plaintiff's argument that he was not bound to a change in the number of hours needed to graduate), aff'd, 906 F.2d 1143 (6th Cir. 1990), cert. denied, 499 U.S. 947 (1991). This is particularly true where the representation Keles's relied upon is contained in a booklet that also cautions:

> Notice: The program and requirements set forth in this bulletin are necessarily subject to change without notice at any time at the discretion of the administration.

See New York University Bulletin 1984-1986, annexed to the Meloy Aff. as Exh. "R." Thus, as the University could change the regulations for Ph.D. matriculation without breaching its contract, and as these changes applied to Keles, Keles breached the implicit contract set forth in the 1986-1988 Guidelines by failing to pass the qualifying examinations after two attempts.

Third, although the relationship between Keles and the University may be analyzed as a contractual one, it is well established under New York law that judicial review of a university's academic decisions is limited to a determination of whether the university has acted arbitrarily, capriciously, irrationally, in bad faith or contrary to law. Garg v. Albert Einstein College of Medicine of Yeshiva Univ., 747 F. Supp. 231, 236 (S.D.N.Y. 1990); Susan M. v. New York Law School, 76 N.Y.2d 241, 557 N.Y.S.2d 297, 298, 556 N.E.2d 1104 (1990); Tedeschi v. Wagner College, 427 N.Y.S.2d at 763.

> When a university, in expelling a student, acts within its jurisdiction, not arbitrarily but in the exercise of an honest discretion based on facts within its knowledge that justify the exercise of discretion, a court may not review the exercise of its discretion.

Carr v. St. John's Univ., New York, 231 N.Y.S.2d at 414.

To determine whether a university has acted in arbitrarily or capriciously, its actions must be judged against its own stated policies and regulations.

See Olsson v. Board of Higher Educ., 49 N.Y.2d 408, 416, 426 N.Y.S.2d 248, 252-53, 402 N.E.2d 1150 (1980). Generally, however, determinations regarding a student's academic performance are entitled to great deference and are rarely found to be arbitrary, as such determinations require the special expertise of educators and play an important role in preserving the integrity of the credentials conferred by the educational institution. Susan M. v. New York Law School, 557 N.Y.S.2d at 300; Olsson v. Board of Higher Educ., 426 N.Y.S.2d at 250. In light of this high standard, the Court finds no evidence that the University acted in bad faith.

In 1984, Keles was notified that he did not qualify as a doctoral student based on his inability to pass the requisite qualifying exams. Three years later, at plaintiff's request, the faculty reviewed his 1984 exam results, advised him that he was not qualified to become a doctoral student based on his performance on the 1984 exams, and that he should retake them. The Department faculty met at least two other times in 1988 to review Keles's 1984 basic physical and chemical sciences qualifying exam, notifying him after each meeting that he was not qualified as a doctoral student based on that exam, but that he could retake it. Keles was unable to pass the qualifying exam even after the Department faculty afforded him repeated opportunities to do so. The Departmental decision in March 1990 to terminate Keles's standing as a graduate student was thus based on the faculty's judgment that he was not qualified to be a doctoral matriculant. This decision was confirmed by the GSAS Dean who ruled in favor of the Department,following Keles's filing of a grievance, finding there was no violation of

University rules and procedures, no unfair grading and no evidence of other wrongdoing.

As the Eleventh Circuit noted, although "[i]t may be unfortunate to spend years studying a discipline only to discover that one's capabilities do not pass academic muster . . . the academic community requires a general comprehensive examination to determine whether or not a student is properly qualified for doctoral accomplishments." Haberle v. University of Alabama in Birmingham, 803 F.2d 1536, 1541 (11th Cir. 1986). There is nothing arbitrary about such a requirement. As Keles failed the examination, he is not entitled to pursue the doctorate in Applied Science at the University. Accordingly, the first and second causes of action for breach of contract are dismissed.

III. **Fraud Claim**

To establish fraud under New York law, Keles must prove "(1) a material, false representation; (2) an intent to defraud thereby: (3) reasonable reliance on the representation; and (4) damage to the plaintiff." Roso v. Saxon Energy Corp., 758 F. Supp. 164, 168(S.D.N.Y. 1991) (quoting Wanamaker v. Columbian Rope Co., 740 Supp. 127, 142 (N.D.N.Y. 1990)); see also Mallis v. Bankers Trust Co., 615 F.2d 68, 80 (2d Cir. 1980), cert. denied, 449 U.S. 112 (1981); Horwitz v. Sprague, 440 F. Supp. 1346, 1350 (S.D.N.Y 1977). Each of these elements must be established by clear and convincing" evidence. Katara v. D.E. Jones Commodities, Inc., 815 F.2d 966, 971 (2d Cir. 1987).

Reliance, which is a "crucial element" of any fraud claim, see Carte Blanche PTE, Ltd. v. Diners Club Int'l Inc., 758 F. Supp. 908, 916 (S.D.N.Y. 1991), must be justifiable under the circumstances. Roval Am. Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1016 (2d Cir. 1989). As a matter of law, fraud premised upon misrepresentations that occur after plaintiff allegedly detrimentally relied cannot establish "justifiable" reliance. See Morin v. Trupin, 711 F. Supp. 97, 104 (S.D.N.Y. 1989) (dismissing fraud claim where defendant's alleged misrepresentation occurred in October 1987, and the only injury was money paid in 1986). In addition, the representation must have been false when made. St. Charles Cable TV, Inc. v. Eagle Comtronics, Inc., 687 F. Supp. 820, 831 (S.D.N.Y. 1988), aff'd without op., 895 F.2d 1410 (2d Cir. 1989). Simple breach of contract does not constitute fraud. Drexel Burnham Lambert Inc. v. Saxony Heights Realty Assocs., 777 F. Supp. 228, 234-35 (S.D.N.Y. 1991) ("[t]he mere failure to keep contractual promises of future acts will not sustain an action for fraud") (quoting Hotel Constructors, Inc. v. Seagrave Corp., 574 F. Supp. 384, 387 (S.D.N.Y. 1983)).

In the case at hand, Keles has failed to demonstrate all of the required elements of fraud necessary to obtain relief. Whereas the complaint alleges that Keles relied on unspecified representations in the 1984-1986 Bulletin, brochures, and a " published advertisement about New York University's master's and Ph.D. program in Applied Science," Complaint at ¶¶ 75, 77, Keles now states that "a specific admission of prior representation" was made by Professor Hoffert in a March 20, 1990 letter. See Keles Aff. at ¶ 35.

Specifically, Keles indicates that Professor Hoffert recognized that "in prior years I had informed [Keles] that [he] would be permitted to take the Qualifying Exams an indefinite number of times;however, this policy has been changed by vote of the Faculty." See Letter from Martin I. Hoffert to Resat Keles of 3/20/90, annexed to the Keles Aff. as Exh. "E."

Keles's claim for fraud fails, however as he offers no facts that would demonstrate that Professor Hoffert's representation that the qualifying examinations could be taken an indefinite number of times was untrue at the time it was made. In fact, at one time this was University policy. The fact that the University amended the 1983 Guidelines and limited the number of times a candidate could sit for the qualifying exams does not give rise to an inference of misrepresentation. Thus, even assuming the University did make statements that Keles relied on in his decision to apply to the Department of Applied Science, these statements could not be deemed fraudulent, as they did not misrepresent existing facts..

Moreover, Keles cannot support his claim that he justifiably relied on such representation in his decision to enroll in the Department of Applied Science's master's program or to apply to the doctoral program. Keles's enrollment in the master's program during the academic year 1983-1984 predates the 1984-1986 Bulletin he claims he relied upon. Similarly, there is no evidence that defendants intended to deceive Keles by misrepresenting the number of times he could take the qualifying examinations. To the contrary, the defendants have presented facts indicating that Keles was given many opportunities to retake the examinations, which he declined.

Although, on occasion, the Court will dismiss a complaint with leave to replead, in order to grant plaintiff an opportunity to remedy the defects in his fraud claim, in the present case, the Court will not permit such repleading. The Verified Complaint's version of the "fraud" between these parties is the classic case of a contract dispute dressed fraud claim. Although the Verified Complaint tracks the language of a fraud claim, i.e., that the University's intentional misrepresentations concerning the requirements for a Ph.D. degree induced Keles to enter the Ph.D. program, there are no facts to support this allegation. Accordingly, the third cause of action for fraud is dismissed.

CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure is granted, and the complaint dismissed. This Order closes the case.

SIGNED

SHIRLEY WHOL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New YorK
April 6 , 1994

APPENDIX D

JUDGMENT FILED APRIL 11, 1994

91 CIVIL 7457 (SWK)
JUDGMENT

U.S. DISTRICT COURT
FILED

APRIL 11, 1994
S. D. OF N.Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, and DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FARHAD KAZEMI, and JOHN BRADEMAS, as president of New York University,

Defendants.

Defendants having moved pursuant to Rules 12(b) (6) and 56(b), F.R.Civ.P. to dismiss the complaint on various grounds, and the said motion having come before the Honorable SHIRLEY WOHL KRAM, U.S.D.J., and the Court thereafter on April 6, 1994, having handed down its memorandum opinion and order (# 73003); granding defendants' motion for summary judgment, pursuant to Rule 56(b), F.R.Civ.P., and dismissing the complaint, and closing the case, its is,

ORDERED,ADJUDGED AND DECREED; That defendants' motion for summary judgment, pursuant to Rule 56(b), F.R.Civ.P., be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed for the reasons stated in the Court's Memorandum Opinion and Order dated April 6, 1994, and it is further,

ORDERED, that the case be and it is hereby closed.

DATED: NEW YORK, NEW YORK
April 11, 1994

JAMES M.PARKINSON
Clerk
By:_____
Deputy Clerk

APPENDIX E
NOTICE OF APPEAL FROM JUDGMENT AND ORDER
NOTICE OF APPEAL
91 Civ. 7457 (SWK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, and DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FARHAD KAZEMI, and JOHN BRADEMAS, as president of New York University,

Defendants.

Notice is hereby given that Plaintiff RESAT KELES hereby appeals to the United States Court of Appeals for the Second Circuit from the Judgment entered in this action on April 11, 1994, which dismissed the action, and from underlying Memorandum Opinion and Order in this action dated on April 6, 1994, which dismissed the action pursuant to Rule 56(b) of the Federal Rules of Civil Procedure.

Dated: May 2, 1994

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To:
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APPENDIX F

VERIFIED COMPLAINT
(40-56)

VERIFIED COMPLAINT
DEMAND FOR
JURY TRIAL

Docket No. 91 CIV.7457
[SWK]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, and JOHN BRADEMAS, as president of New York University.

Defendants.

Plaintiff RESAT KELES. as and for his verified pleading alleges:

JURISDICTION

1. Jurisdiction is premised upon diversity of citizenship, 28 U.S.C. 1332. Plaintiff is a Turkish citizen, who is present in New York under a student visa. Plaintiff was first a master's degree student, and then a doctoral student in the Department of Applied Science at New York University.

THE PARTIES

2. Upon information and belief, the defendant New York University is an educational corporation, chartered under the laws of New York State, conducting its business at Washington Square, New York City.

3. Defendant John Brademas is the president of New York University.

4. During the period in issue herein, Dr. Gabriel Miller was the Director of Graduate Studies at New York University.

5. During the period in issue herein, Dr. Ferhad Kazemi was the acting dean of the graduate school of arts and Sciences at New York University.

6. During the period in issue herein, Dr. Martin Hoffert was the chairman of the Department of Applied Science at New York University.

7. Upon information and belief, all the said individual defendants are still employed at New York University, in New York State.

FIRST CAUSE OF ACTION

8. Plaintiff enrolled in New York University's graduate Department of Applied Science, commencing with the Spring, 1984 term. New York University granted plaintiff substantial scholarships, which scholarships endured during his enrollment there.

9. Plaintiff was then pursuing a master of science degree in the Department of Applied Science.

10. Plaintiff consistently received grades of A while pursuing a master of science degree in the Department of Applied Science.

11. On June 6, 1985, the registrar of New York University certified that plaintiff had completed all the requirements for a master of science degree in the Department of Applied Science.

12. Plaintiff's graduate transcript states that the said master's degree was awarded to plaintiff on June 6, 1985.

13. After the award of the said master's degree, plaintiff registered in the Ph.D. program in the Department of Applied Science.

14. After the award of the said master's degree, on or about August 8, 1985, plaintiff continued in New York University's Ph.D. degree program in the Department of Applied Science.

15. New York University required that plaintiff successfully complete of coursework in order to obtain a Ph.D. degree in the Department of Applied Science.

16. Thereafter, plaintiff successfully completed 84 credits of coursework in his Ph.D. program in the Department of Applied Science. Only 72 credits of coursework were required under the Ph.D. program.

17. Plaintiff's graduate transcript for the master's degree program, and for the Ph.D. program shows that he received 26 grades of A, and one grade of B, reflecting all of his 27 courses.

18. New York University's graduate Department of Applied Science required that plaintiff pass two written examinations in order to qualify for his Ph.D. program in the Department of Applied Science.

19. Pursuant to that requirement imposed by New York University, plaintiff took written qualifying examinations in mathematical science, and in physical and chemical science.

20. In a letter to plaintiff dated December 17, 1987, Gabriel Miller, the graduate director, advised plaintiff that he had not passed the written qualifying examination in mathematical science.

21. In a letter to plaintiff dated January 27, 1988, Gabriel Miller, the graduate director, advised plaintiff that his grade in the mathematical science qualifying exam had been reevaluated, and that he had passed the written mathematical science qualifying examination.

22. Plaintiff took the written qualifying examination in physical and chemical science in November, 1984.

23. Plaintiff received a passing grade in the November, 1984 written qualifying examination in physical and chemical science.

24. Thereafter, the Department of Applied Science maintained that plaintiff had failed the written qualifying examination in physical and chemical science.

25. Subsequently, the Department of Applied Science misplaced and lost plaintiff's 1984 examination book in physical and chemical science.

26. Thereafter, at the urging of the Department of Applied Science, plaintiff re-took the written examination in physical and chemical science on April, 1989.

27. After plaintiff took the said examination in April, 1989, New York University substantially changed its rules on the qualifying examinations, so as to allow students only 2 opportunities to take a particular qualifying examination, and so as to require that students apply to the Department for permission to take the qualifying examination.

28. In a letter to plaintiff dated January 5, 1990, Gabriel Miller, the director of graduate studies,

advised plaintiff that he had not passed his written examination in physical and chemical science.

29. In a letter to plaintiff dated March 8, 1990, Gabriel Miller denied plaintiff any further opportunity to re-take the written examination in physical and chemical science, stating:

"At a meeting on March 8, 1990 the faculty voted not to allow you to take the Ph.D.Qualifying exams in May, 1990."

30. In a letter to plaintiff dated March 20, 1990, Martin I. Hoffert, the Chairman of the Department of Applied Science, advised plaintiff that " a decision was reached to terminate your standing as a graduate student in our Department."

31. Subsequently, on or about August 1, 1990, plaintiff attempted to register to renew his matriculation in the Department of Applied Science, but his registration was refused by Dr. Ferhad Kazemi.

32. In effect, plaintiff was completely excluded from the graduate school, and the Department of Applied Science.

33. Since August 1, 1990, plaintiff has filed a number of petitions to appeal from foregoing determinations made by the defendants, but his petitions were denied.

34. When plaintiff enrolled in New York University's Graduate School of Arts and Science Department of Applied Science on or about the spring term of 1984, specific rules governed the qualifying examinations for the Ph.D.program.

35. Under the New York University graduate bulletin for 1984 to 1986, plaintiff had the right to re-take the qualifying examination in physical and chemical science three times. Each year, it was given in April and December.

36. The March, 1983 rules for the Department of Applied Science's qualifying examinations state that " Written and oral examinations may be taken as often as possible.."

37. At the time of his enrollment in the Ph.D. degree program, the Department of Applied Science permitted students to repeat their failed qualifying examinations an indefinite number of times.

38. Under New York University's graduate bulletin for 1984 to 1986, doctoral candidates were allowed ten years to complete all requirements for the Ph.D. degree.

39. While plaintiff was still enrolled with the Department of Applied Science in the Ph.D. program, in September. 1985, the Department of Applied Science substantially changed its rules, so as to allow only two opportunities to take a specific qualifying exam.

40. New York University's Department of Applied Science wrongfully denied plaintiff an opportunity to re-take the qualifying examination in physical and chemical science.

41. New York University's Department of Applied Science wrongfully terminated plaintiff from its Ph.D program.

42. Express conditions governed plaintiff's educational contract with New York University, which conditions were stated in the New York University graduate bulletin for 1984 to 1986.

43. Express conditions governed plaintiff's educational contract with New York University, which conditions were stated in the Department of Applied Science's 1983 rules for the qualifying examinations.

44. The existence of an educational contract was implied from all the circumstances of plaintiff's enrollment in the Ph.D. degree program in Applied Science at New York University.

45. New York University breached its educational contract with plaintiff, by denying plaintiff his right to re-take his physical and chemical science qualifying examination an indefinite number of times.

46. New York University breached its educational contract with plaintiff by terminating plaintiff from its graduate school in 1990, when the 1984 to 1986 graduate bulletin allowed him 10 years to complete all requirements for the Ph.D. degree.

47. After plaintiff enrolled in the said Ph.D. program, New York University substantially changed the rules governing the said program. New York University retroactively applied these new rules to students, such as plaintiff, who had enrolled prior to the enactment of these new rules.

48. After plaintiff enrolled in the said Ph.D. program, New York University denied plaintiff the benefit of the rules that had been in effect when plaintiff enrolled in the said program.

49. Plaintiff had successfully completed all the course work for the Ph.D. and the master's degree, and his transcript shows a course grade record containing almost all A grades in 26 doctoral level courses which are the basis of the qualifying examination.

50. The defendants have neglected and refused to honor the educational agreement made with plaintiff at the time of his enrollment in the Department of Applied Science's Ph.D. program.

51. The said breach damaged plaintiff in the amount of $30,000,000.

SECOND CAUSE OF ACTION

52. The allegations stated in paragraphs 1 though 51 are re-alleged under this second cause of action.

53. On or about July, 1981, the New York State Education Department authorized New York University to grant Ph.D.'s in the Department of Applied Science.

54. In order to obtain an authorization from the State Education Department to grant the Ph.D. in Applied Science, New York University submitted proposals to the State Education Department relating to its proposed Ph.D. program in Applied Science.

55. New York University's said proposals contained the specific terms of its authorized Ph.D. program in Applied Sclence.

56. New York University's 1980 proposal and registration documents, submitted to the State Education Department, stated that the qualifying examinations could be administered orally or in written form.

57. The said proposals stated that the oral form of the qualifying examination was the preferred form for the qualifying examination.

58. The said proposals stated:

> "While the oral examination is preferred for purposes of establishing the student's strengths and weaknesses, a written equivalent of the qualifying examinations may be substituted with the approval of the Committee on Graduate Studies in Applied Science.

In addition,students who fail one or two of the oral exams can request a written examination in the deficient discipline or disciplines within two months after the oral examination. A passing grade on this examination will consitute a passing grade on the qualifying examination.

59. New York University's 1984 to 1986 graduate bulletin stated:

" To qualify as a Ph.D. matriculant, the student must pass a combination of written and oral qualifying exams in three areas."

60. Plaintiff strongly desired that the qualifying examinations be administered to him orally.

61. Plaintiff demanded of the defendants that the qualifying examinations be administered to him orally.

62. Defendants did not administer the qualifying examination in mathematics to plaintiff in oral form.

63. Defendants refused to re-administer the qualifying examination in physical and chemical science to plaintiff in oral form.

64. In plaintiff's several petitions adressed to the defendants, plaintiff demanded that the physical and chemical science qualifying examination be re-administered to him in oral form.

65. In 1990, and on prior occasions, the defendants refused to re-administer the physical and chemical science qualifying examination to plaintiff in written form.

66. The defendants refused to re-administer the physical and chemical science qualifying examination to plaintiff in oral form.

67. Oral qualifying examinations were the preferred manner plaintiff's strengths and weaknesses.

68. Under New York University's proposals submitted to the State Education Department, related to its proposed Ph.D. program in Applied Science, it was to be the norm that the qualifying examinations be administered orally.

69. Under New York University's proposals submitted to the State Education Department, related to its proposed Ph.D. program in Applied Science, it was to be the exception that the qualifying examinations would be administered in written form.

70. The terms of the said proposals endowed plaintiff with a contractual right to be tested orally for the qualifying examination in physical and chemical science.

71. New York University wrongfully and in bad faith breached and violated plaintiff's contractual rights as a student, by refusing to administer or to re-administer the qualifying examination to him orally.

72. Plaintiff believes that he might have scored significantly higher if the physical and chemical science qualifying examination had been admistered to him orally.

73. The said breach damaged plaintiff in the amount of $30, 000, 000.

THIRD CAUSE OF ACTION

74. The allegations stated in paragraphs I though 73 are re-alleged under this third cause of action.

75. By reason of seeing a published advertisement about New York University's master's and Ph.D. program in Applied Science, and studying the 1984 to 1986 bulletin, Plaintiff enrolled in the said program at New York University's department of Applied Science.

76. The 1984 to 1986 bulletin stated the educational requirements of the said program, and described the examination procedures in effect.

77. In deciding whether to enroll, and upon enrolling in the said program, plaintiff justifiably relied upon the representations made in the said bulletin, and brochures and the said advertisement.

78. Thereafter, plaintiff successfully completed 72 credits of coursework, satisfying the coursework requirement for the Ph.D. degree.

79. Plaintiff enrolled in the said program, and completed 72 credits of coursework in the department of Applied Science, believing that the substantial terms and conditions of his education would remain in full effect.

80. The Department of Applied Science wrongfully determined to deny plaintiff a Ph.D.

81. Plaintiff took the qualifying examination in physical and chemical science in November, 1984. The professor who graded the said examination gave plaintiff a passing grade of 60.

82. Thereafter, Gabriel Miller overruled the grading professor, and changed plaintiff's grade of 60 into a failing grade of 51.

83. Plaintiff insisted to the Department of Applied Science that he had passed the said examination, but the Department of Applied Science persuaded him to re-take the said examination.

84. Plaintiff re-took the qualifying examination in physical and chemical science in December, 1989. He was given a grade of 56.

85. The grades for the qualifying examinations were all finalized in a meeting in the Department of Applied Science. Under the practice in effect at those meetings, students with a grade of 56 were occasionally deemed to have passed on the qualifying examination.

86. After plaintiff took the December, 1989 qualifying examination in physical and chemical science, the Department of Applied Science substantially changed its rules, so as to only permit two opportunities to take the said examination. It changed its rules, to require that students apply to the Department of Applied Science for permission to take a qualifying examination. Both of the said changes were made without the authorization or permission of the New York State Education Department, which had approved this particular Ph.D. program.

87. After receiving his examination book for the December, 1989 examination, plaintiff submitted copies of the test and his examination books to Dr, Alan T. McDonald, a distinguished professor of mechanical engineering at Purdue University.

88. On or about July 27, 1990, Dr. McDonald analyzed the said papers, and determined that plaintiff should have received a grade of 70 on the said qualifying examination. As 60 was the passing grade for the said qualifying examination, Dr. McDonald's finding of a merited grade of 70 would have been a passing grade. Dr. McDonald submitted his report to Acting Dean Kazemi.

89. After the said December, 1989 examination, the Department of Applied Science denied plaintiff a further opportunity to take the qualifying examination.

90. After the December, 1989 examination, the Department of Applied Science expelled plaintiff from the said department.

91. After the December, 1989 examination, when plaintiff sought to register and renew his matriculation, acting Graduate Schoool Dean Kazemi refused to allow him to do so. On his appeal to John Brademas, president of New York University, seeking to renew his matriculation, plaintiff received no response, and plaintiff was not permitted to renew his matriculatiion.

92. Under the rules which governed when plaintiff enrolled in the Department of Applied Science, plaintiff would be permitted an indefinite number of opportunities to take and retake said qualifying examination.

93. Under the rules which governed when plaintiff enrolled in the Department of Applied Science, plaintiff would have 10 years to complete all the requirements for his Ph.D. degree.

94. Under the rules which governed when plaintiff enrolled in the Department of Applied Science, the qualifying examinations were supposed to be administered to plaintiff orally.

95. All the qualifying examinations which plaintiff took were administered to him in writing.

96. New York University and its Department of Applied Science materially and substantially changed its rules and procedures after plaintiff had successfully completed the 72 credits required for the Ph.D. degree, and an additional 12 credits, making a total of 84 credits.

97. The said representations made by New York University and the Department of Applied Science upon plaintiff's enrollment in the said program were false when made, and/or were made with a pretense of actual knowledge when knowledge did not actually exist, and/or were made recklessly and without regard to the actual facts. The said representations made to plaintiff were made with the intention of deceiving and defrauding plaintiff, and were made in order to induce plaintiff to enroll in the said Ph.D. program.

98. The representations made in order to induce plaintiff to enroll in the said program were false, in that they could be substantially altered, and were substantially altered during plaintiff's enrollment in the said Ph.D. program.

99. At the time of his enrollment, plaintiff was unaware that New York University and the Department of Applied Science could substantially change the rules governing the Ph.D. degree at their own whim and caprice.

100. That when the said representationswere made to plaintiff prior to his enrollment, plaintiff justifiably believed that the requirements for his Ph.D. degree, and the testing procedures would remain the same during the entire period of his enrollment at New York University's Graduate School.

101. Plaintiff did not discover that the rules governing his degree and the testing procedures could and would be substantially changed until after December, 1989.

102. Plaintiff did not discover that the Department of Applied Science would undermark and undergrade his qualifying examination results on the physical and chemical science qualifying examination until he was advised that he had failed the said examinations.

103. Exercising reasonable diligence, plaintiff was unable to discover the true facts until he had substantially completed all the coursework required for the Ph.D. degree.

104. When the said representations were made to plaintiff at the time of his enrollment in the said program, plaintiff did believe that they were true, and relied upon them, and was thereby induced to enroll in the said program, all at great expense and enormous effort to him.

105. Had plaintiff then known how the rules and procedures of the Department of Applied Science would substantially change during his enrollment, then plaintiff would have enrolled in a different university.

106. Plaintiff devoted significant effort in order to to successfully complete 72 credits of coursework for the said degree, and he paid various fees and sums of money to New York University.

107. The said fraud and or misrepresentation damaged plaintiff in the amount of $30,000,000. In addition, plaintiff shall seek exemplary damages and/or treble damages.

WHEREFORE, Plaintiff demands judgment against the defendants, individually, jointly and severally for $30,000,000 under the first cause of action; $30,000,000 under the second cause of action, $30,000,000 under the third cause of action with exemplary and/or treble damages, together with interest, cost of suit and attorney fees.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues raised by these pleadings.

MORGAN KENNEDY
Attorney for Plaintiff
133 East 15th Street
New York, N.Y. 10003
(212) 228-3269

VERIFICATION

Plaintiff RESAT KELES, being duly sworn, affirms that this pleading is true to his knowledge, except as to matters alleged on information and belief, and as to those matters, he believes them to be true.

RESAT KELES Date

MORGAN KENNEDY
Notary No. 4822610
Qualified in N.Y. County
Commission expires 10/31/92

APPENDIX G

NYU MOTION PAPERS
(20-89)
91 Civ.7457 (SWK)

NOTICE OF MOTION
AND MOTION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, and JOHN BRADEMAS, as president of New York University,

Defendants.

PLEASE TAKE NOTICE that upon the Complaint herein, the annexed Affidavit of Ada Meloy sworn to on February 6, 1992 and the exhibits thereto, and the accompanying Memorandum of Law in Support of Motion to Dismiss, and pursuant to permission granted on January 24, 1992, the undersigned will move this Court at the United States Courthouse, Foley Square, New York, New York, before the Honorable Shirley Wohl Kram on March 2, 1992 at 9:30 a.m. or as soon thereafter as counsel may be heard as follows:

(1) to dismiss the Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) in that the

Complaint fails to state a claim for relief against defendants or any of them because:

(a) the Complaint's first and second putative causes of action for breach of contract fail to state a claim for relief under the laws of the State of New York;

(b) the Complaint's third putative cause of action fails to state a claim for fraud with the requisite particularity under Federal Rule 9(b) and fails to state a claim for relief under the law of New York;

(c) the Complaint's first and second putative causes of action are barred by the applicable statute of limitations of New York's Civil Practice Law and Rules Section 217; and

(d) the Complaint third putative cause of action is barred by the applicable statute of limitations of New York's Practice Law and Rules Sections 213(8) and 203(f).

(2) in the alternative, for summary judgment pursuant to Federal Rule of Civil Procedure 56(b) dismissing the Complaint; and

(3) for such other and further relief as this Court may seem just and proper including the award of costs, disbursements and attorneys' fees to New York University.

Dated: New York, New York
February 7, 1992

S. ANDREW SCHAFFER 8628
ADA MELOY 4092
SIGNED(*ada Meloy*)

Attorneys for Defendants
70 Washington Square South
New York, NY 10012
(212) 998-2258

TO: MORGAN KENNEDY, ESQ.
Attorney for Plaintiff
133 East 15th Street
New York, NY 10003
(212) 228-3269

APPENDIX G-1

AFFIDAVIT OF
ATTORNEY ADA MELOY
(22-39)

91 Civ. 7457 (SWK)

AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, and JOHN BRADEMAS, as president of New York University.

Defendants

STATE OF NEW YORK)
ss. :
COUNTY OF NEW YORK)

ADA MELOY, being duly sworn, deposes and says:

1. I am Associate General Counsel of New York University ("the University"), and I am appearing as counsel for defendants herein along with S. Andrew Schaffer. I submit this affidavit in support of defendants' motion to dismiss the Complaint, or, in the alternative, for summary judgment dismissing the action, and for other relief.

The information presented below is based upon the annexed exhibits and the books and records of the University.

2. This action was filed on or about November 4, 1991 by plaintiff, a former graduate student at the University's Graduate School of Arts and Science ("GSAS"), Department of Applied Science[1] (a copy of the Complaint is annexed as Exhibit A). The Complaint purports to set forth three putative causes of action against the University, the then President of the University, and three GSAS faculty members.[2] The first two alleged causes of action purport to allege breach of an implied educational contract. The third alleged cause of action

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[1] GSAS is one of fourteen schools and divisions of New York University. The Department of Applied Science is one of 42 departments and programs within GSAS, and it offers courses of study leading to the masters and doctoral degrees. The program emphasizes a goal-oriented approach to the concerns of society throuqh the interdisciplinary application of science and engineering. Students undertake advanced study in the concentrations in energy science and atmospheric science. A number of applied and special topics courses prepare professionals for careers in scientific and technical research, education, business, or public administration (see GSAS Bulletin, annexed as Exhibit E).

[2] Farhad Kazemi (sued herein as "Ferhad Kazemi") is Professor of Political Science who, from August, 1989 through August, 1991 served as Acting Dean of GSAS. Martin Hoffert is Professor of Applied Science who has been Chairman of the Department since September, 1984. Gabriel Miller is Professor of Applied Science who has served as Director of Graduate Studies for the Department from 1974 through 1978 and since September, 1987. The Complaint fails to allege any wrongful behavior on the part of any individual defendant.

purports to allege injuries to plaintiff arising from fraudulent misrepresentations by the University, which plaintiff claims induced him to enroll in the masters and doctoral programs in Applied Science. In essence, all three claims relate to plaintiff's dissatisfaction with the educational processes of GSAS and with the Department of Applied Science's decision to terminate his standing as a graduate student in the Department after plaintiff failed to satisfy the Deparmental requirements that to qualify as a doctoral matriculant a student must pass qualifying examinations in three areas. Plaintiff seeks $90,000,000 in compensatory damages plus punitive damages.[3]

Plaintiff's Academic History

3. In October, 1983 plaintiff, who was then 33 years old and a student at Manhattan College, applied to the GSAS doctoral program in Applied Science (see application form, annexed hereto as Exhibit B). In a letter dated November 15, 1983, the GSAS Director of Admissions notified plaintiff that "due to the rigorous entrance requirements of the Department of Applied Science" plaintiff was admitted only to the masters program rather than to the doctoral program for which he applied (see copy of letter attached hereto as Exhibit C). As reflected by his academic transcript (a copy of which is annexed hereto as Exhibit D; Complaint ¶ 12), plaintiff enrolled in the masters program in Applied Science

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[3] While the Complaint premises federal jurisdiction on diversity of citizenship (Complaint ¶ 1), it fails to properly allege the amount in controversy. Furthermore, there are no clues as to how the plaintiff arrives at the $90,000,000 damage figure.

during the spring term, 1984, i.e., the second semester of academic year 1983-84 (Complaint ¶ 8). He was granted a Master Or Science Degree on June 6, 1985 (Complaint ¶ 12), after three semesters of study, and he continued to take courses in the Department of Applied Science during academic years 1985-86 and 1986-87 (Complaint ¶ 14). His last courses were completed in or about June, 1987. After that time, plaintiff maintained matriculation by paying the requisite fee which entitled him to use the library and other University facilities for three academic years from September 1987 through June 1990 (see Exhibit D).

4. In describing the requirements for award of a Doctor of Pnilosophy ("Ph.D.") in the Department of Applied Science, the GSAS Bulletin states:

> All Ph.D. candidates must complete 72 points (with at least 36 points in residence at New York University), the selection of which meets the approval of a program adviser. To qualify as a Ph.D. matriculant, a student must pass, no later than 40 credits beyond the baccalaureate, a written and oral examination in three areas. In addition, a student must fulfill the language requirement...and complete, and successfully defend, a doctoral dissertation.
>
> * * *
>
> To qualify as a Ph.D. matriculant, the student must pass a combination of written and oral qualifying exams in three areas. In following list of areas, two are chosen from areas 1, 2, or 3, and the third must be chosen from either 4a or 4b.
>
> 1) Basic Mathematical Sciences:...

2) Basic Physical and Chemical Sciences:...
3) Basic Social Sciences:...
4a) Applied Science (Energy Science Concentration):...
4b) Applied Science (Atmospheric Science Concentration):...

While the oral examination in the applied science concentration is preferred for establishing the student's strengths and weaknesses, a written equivalent of the qualifying examinations may be substituted with the approval of the committee on graduate studies in applied science. Ordinarily, students will be prepared academically for the qualifying examination upon completion of 30 to 36 credits, but it is understood that only strongly research oriented candidates should be encouraged to take the qualifying examination. Students entering the graduate program with advanced degrees from other institutions may need to do additional graduate work prior to taking the qualifying examination. The written examination may be taken no more than two times. Upon receipt of a passing grade on the qualifying examination, the student is admitted to Ph.D. candidacy in the Department of Applied Science.

Additional requirements for the Doctor of Philosophy in Applied Science are the completion of 72 graduate credit points of which 36 must be in residence at New York University,

> the demonstration of foreign language proficiency, the writing of a doctoral dissertation, and the passing of an oral thesis defense examination. After passing the qualifying examination, the student requests the formation of a doctoral research committee of five, chaired by a departmental faculty member....
>
> (Annexed as Exhibit E is a copy of pertinent portions of the GSAS Bulletin for 1986-88.)

Thus, two of the topic areas for examination prior to being admitted to doctoral degree candidacy are selected from three possible examination areas: basic mathematical sciences, basic physical and chemical sciences, and basic social sciences. The third examination area is in one of two applied science concentrations (Exhibit E). Plaintiff here, as further discussed below, took the examinations in basic mathematical sciences and basic physical and chemical sciences (Complaint ¶ 19). Those qualifying examinations are given in written form. A student may take the oral qualifying examination in the applied science concentration after successfully passing the two written qualifying examinations.

5. In November, 1984, during plaintiff's second semester in the masters program in Applied Science, he unsuccessfully attempted to pass the written Ph.D. qualifying exams in basic mathematical sciences and basic physical and chemical sciences. Plaintiff was notified on December 14, 1984 that he had failed both of the qualifying exams. Plaintiff was again notified that he had failed the mathematics exam by letter of May 14, 1985 (see letters to plaintiff

from Barry Rugg, Director of Graduate Studies, annexed hereto as Exhibit F).[4]

6. Three years later, after he had completed his coursework, plaintiff attempted to have the results of his 1984 examinations changed from "failure" to "passing." After review by Department faculty, plaintiff was advised that the failing grades would remain but that he could retake the qualifying exams (see letters to plaintiff from Gabriel Miller, Graduate Advisor, dated September 8 and 17, 1987 annexed hereto as Exhibit G). Plaintiff did retake the hasic mathematical sciences examination--and passed it--in November 1987 (see letter dated January 27, 1988 attached hereto as Exhibit H; Complaint ¶ 21).

7. At plaintiff's request, the Department faculty met at least twice in 1988 to review plaintiff's 1984 physical and chemical sciences examination. After each meeting, plaintiff was notified that his failing score would not be changed (see letters dated February 11, 1988 and March 24, 1988 annexed hereto as Exhibit I).

8. In July, 1988 after petitioning Dr. Benjamin Bederson, then Dean of GSAS, for permission to take the oral qualifying exam in the applied science concentration, plaintiff was advised that he first had to pass the written exam in basic physical and chemical sciences and that he should take the written exam when it was next given

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[4] Plaintiff's allegation that he passed the written qualifying examination in physical and chemical sciences in November,1984 (Complaint ¶ 23) is contradicted by this documentary evidence.

(see letter dated July 22, 1988 annexed hereto as Exhibit J). Plaintiff stated his intention to re-take the qualifying exam, and this intention was acknowledged by Dean Bederson (see letters dated October 14, 1988 and October 27, 1988 annexed hereto as Exhibit K). However, plaintiff failed to take the exam the next two times it was offered[5] waiting for more than a year to retake the qualifying exam in basic physical and chemical sciences. When he finally took the test in December, 1989, he again failed it (see letter dated January 5, 1990 attached hereto as Exhibit M; Complaint ¶ 28).

9. As of March, 1990, six years after plaintiff enrolled in the masters program in Applied Science and over five and one-half years after he first attempted to qualify for the Ph.D. program in Applied Science, plaintiff had only passed one of the three qualifying examinations required by the Department for Ph.D. matriculation. In March, 1990 after full deliberation and review, the Department faculty voted to terminate plaintiff's standing as a graduate student in the Department (see letters dated March 8, 1990 and March 20, 1990, attached hereto as Exhibit N; Complaint ¶ 29-30).

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[5] Instead, plaintiff kept arguing that he passed the test in 1984. See letter dated May 12, 1989 attached hereto as Exhibit L; Complaint ¶ 83.

10. Plaintiff's dissatisfaction with the Department's decision to terminate his standing led filing a 48 point grievance alleging "breach of contract, mistakes, and misrepresentations" against the Department of Applied Science, its Chairman, Martin Hoffert,and its director of graduate studies, Gabriel Miller (a copy of plaintiff's petition, dated August 1, 1990 is appended hereto as Exhibit O).[6] In August, 1990, following the appropriate grievance procedures, the Dean of GSAS ruled in favor of the Department and faculty finding that there was no basis for plaintiff's grievance in that there was no violation of University rules and procedures, no finding of unfair grading, and no evidence of other wrongdoing (a copy of the decision, dated August 8, 1990, is annexed hereto as Exhibit P). In upholding the Department's decision, the Dean stated:

> I believe the department has shown its good faith by affording you repeated opportunities to retake the examination, opportunities which you chose not to use, as well as by convening as a committee of the whole to review your answers to the Physical and Chemical Sciences exam. I find there has been no violation of university rules and procedures and

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[6] Plaintiff had shown his prospensity to appeal grades awarded to him on many occasions. As his transcript reflects, his grades in four courses were raised after they had been entered in his records (see Exhibit D). In addition, plaintiff had successfully appealed his grade in the mathematics portion of the qualifying examination as he persuaded faculty members to change grades given to him in his second attempt to pass the exam. (see Exhibit H).

therefore there is no basis for your grievance. (Exhibit P).

11. The finality of the decison was confirmed on at least two separate occasions: first, in a letter from Ferhad Kazemi dated August 20, 1990 which stated " My decision of August 8, 1990, stands." and second, in a February 28, 1991 letter in response to plaintiff's appeal to President Brademas, which stated " For the reason carefully articulated to you by Dean Kazemi in his letters to you dated August 8, 1990 and August 20, 1990 (copies attached there is no basis for re-opening this matter and the decisions of Dean Kazemi dated August 8, 1990 stand." (Copies of the letters are attached hereto as Exhibit Q.)[7]

The Complaint

12. The Complaint filed with this Court by plaintiff in November, 1991, well over 18 moths after he was notified of the Departmental decision to terminate his standing as a graduate student in the Department over a year after the Dean's ruling, completely ignores the facts underlying the decision. The Complaint accuses the University and its faculty members and President of "neglect[ing] and refus[ing] to honor the educational agreement made with plaintiff"(Complaint ¶ 50), " wrongfully and in bad faith breach[ing] and viola[ting] plaintiff's contractual rights as a student"(Complaint ¶ 71), " wrongfully determin[ing] to deny plaintiff a Ph.D." (Complaint ¶ 80), and "deceiving and defrauding plaintiff"

[7] Plaintiff's allegations that he received no response to his appeal to President Brademas (Complaint ¶ 91) is contradicted by this documentary evidence.

(Complaint ¶ 97). These bald allegations are nothing more than plaintiff's attempt to convert his disappointment and frustration with his inability to qualify as a doctoral student into a legal claim.

The Complaint's putative first cause of action

13. The Complaint has three putative causes of action.

First, plaintiff alleges that "the existance of an educational contract was implied from all circumstances of plaintiff's enrollment in the Ph.D. program in Applied Science at New York University" (Complaint ¶ 44). Plaintiff alleges that New York breached " express conditions"[8] of his purported implied educational contract (1) " by denying plaintiff his right to re-take his physical and chemical science qualifying examination an indefinite number of times" (Complaint ¶ 45) and (2) " by terminating plaintiff from its graduate school in 1990" (Complaint ¶ 46). Plaintiff further alleges that

> The defendants have neglected and refused to honor the educational agreement made with plaintiff at the time of his enrollment in the Department Applied Science's Ph.D. program.

(Complaint ¶ 50). These allegations completely ignore the fact (as admitted by plaintiff) that he was never enrolled in the Ph.D. program at all. Rather,

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8 These " express conditions" were allegedly set forth in the 1984-86 GSAS bulletin (see Ex.R) and in 1983 rules of the department (Complaint ¶¶ 42, 42).

he was a masters student attempting to be admitted as a doctoral matriculant, hence the necessary of passing the doctoral qualifying exams (Complaint ¶¶ 9, 18).[9] Furthermore,plaintiff does not allege, nor could he, that he had a contractual right to a status of " doctoral student" or even "graduate student" at the time his standing as a graduate student was terminated.

The Complaint's putative second cause of action

14. In the Complaint's second putative cause of action, plaintiff alleges that he was "endowed... with a contractual right to be tested orally for the qualifying examination in physical and chemical science " purported statements in New York University's 1980 proposal for approval of the doctoral program submitted to the State Education Department [10] (Complaint ¶ 70). Plaintiff alleges that New York University breached his contractual right " as a student" by refusing to administer or re-administer the qualifying examination in basic physical and chemical sciences to him orally (Complaint ¶ 71). Not only there is no basis for plainiff's claim that the exam should be administered to him orally, there is no basis for his allegation that

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[9] Complaint's suggestions that plaintiff automatically registred or continued in the Ph.D. program after the award of his masters degree (Complaint ¶¶ 13-14,37, 39, 47, 50) are thus misleading.

[10] Plaintiff alleges that the proposed specifications for the doctoral program in Applied Science submitted by the New York University to the State Education Department in 1980 stated that the oral form of the qualifying examination was the preferred form for the qualifying examination.(Complaint ¶ 57).

"plaintiff believes that he might have scored significantly higher if the physical and chemical science qualifying exam had been administred to him orally"(Complaint ¶ 72). Plaintiff's beliefs about his academic abilities are not the basis upon which an educational institution makes its decisions or awards its degrees.[11]

The Complaint's putative third cause of action

15. Plaintiff third putative cause of action accuses the University and its faculty of fraudulent behavior. Plaintiff alleges that in deciding whether to enroll in New York University's master and doctoral programs in Applied Science, he relied on upspecified representations made by New York University and the Department of Applied Science in an unspecified advertisement , in the 1984-86 Bulletin, and in unidentified brochures. The Complaint alleges:

> 75. By reasons of seeing a published advertisement about New York University's masters and Ph.D.programs in Applied Science, and studying the 1984 to 1986 bulletin, Plaintiff enrolled in the said program at New York University's department of Applied Science.

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[11] Similarly plaintiff's effort to have an outsider reviewer grade his exam (Complaint ¶ ¶ 87-88) is irrelevant. Just as it is not relevant how the court in its own judgmnet would grade the exams, it is not relevant how an outsider would grade a qualifying exams given at New York University, and the University's faculty judgment controls.

> 76. The 1984 to 1986 bulletin stated the educational requirements of the said program, and described the examination procedures in effect.
> 77. In deciding whether to enroll, and upon enrolling in the said program, plaintiff justifiably relied upon the representations made in the said bulletin, and brochures and said advertisement.
> ...
> 104. When the said representations were made to plaintiff at the time of his enrollment in the said program, plaintiff did believe that they were true, and relied upon them, and was thereby induced to enroll in said program, all at great expense and enormous effort to him.

Plaintiff alleges that the purported representations "were false, in that they could be substantially altered,and were substantially altered during plaintiff's enrollment..."(Complaint ¶ 98).[12]

Defendants' Motion to dismiss

16. This action is barred by a failure to state a claim for relief. As is discussed in the

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[12] Plaintiff implies (but does not allege) that the purported false representations had something to do with examination rules (Complaint ¶¶86, 92-94, 96, 99). Plaintiff alleges that rules were changed (Complaint ¶ 39, 47, 86, 96) but does not allege that the rules were part of the purported false representation upon which he relied in making a determination to enroll in the masters and doctoral programs in Applied Science.

Memorandum of Law, the academic judgment challenged by plaintiff does not rise to the level of a judically cognizable claim. Plaintiff has not shown any arbitrary or capricious behavior on the part of the University or its faculty. The Departmental faculty offerred numerous accommodations to plaintiff in their efforts to provide every opportunity for plaintiff to qualify as a doctoral student. After a substantial amount of testing and review, the faculty determined that plaintiff was not qualified to be a candidate for the Ph.D. in Applied Science. Contrary to any suggestion that the decision was arbitrary or capricious or lacking good faith, this faculty consensus shows a concerted effort on the part of the faculty to come to a just decision based on plaintiff's academic record and test scores.

17. Additionally, plaintiff's evasive averments of fraud are so lacking in particularity as to make it impossible to frame a response. Plaintiff's conclusory accusations of fraudulent behavior on the part of the University are completely contrary to fact. He has absolutely no basis for claiming that in applying to the masters or doctoral program he "relied" on any misrepresentations in any bulletins, brochures or advertisements, and not one fact has been presented to support the notion that he was defrauded in any way. It is unlikely that plaintiff ever saw a copy of the 1984-86 Bulletin prior to his decision in October, 1983 to apply to the doctoral program in Applied Science.[13] Even if he had relied on the 1984-86 Bulletin, while it describes the three qualifying exams for doctoral matriculation, it does

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[13]The date of publication of the 1984-86 GSAS Bulletin was March 11, 1985, after plaintiff had been enrolled in the masters program for over a year. (See Exhibit R.)

not represent that the three exams will be given in oral form or that they may be taken an indefinite number of times (see copy of pertinent portions of the 1984-86 GSAS Bulletin, annexed as Exhibit R).

Rather, the Bulletin states "[t]he examination may be repeated no more than three times." Furthermore states that "[t]he program and the Bulletin explicitly requirements set forth...are necessarily subject to change without notice at any time at the discretion of the administration." (Exhibit R).

18. Most telling is plaintiff's allegation in support of his fraud claim:

> The Department of Applied Science wrongfully determined to deny plaintiff a Ph.D.

(Complaint ¶ 80). This allegation, sprinkled in various forms throughout the Complaint (¶¶ 41, 46, 80) belies plaintiff's real complaint which is ultimately based on his own inability to earn a Ph.D. -- not on any fraudulent or wrongful behavior on the part of the University or its faculty. The University did not wrongfully deny plaintiff a Ph.D. No one ever promised that plaintiff would be awarded a Ph.D. or that he could qualify as a doctoral matriculant if he failed to pass the qualifying exams.

19. Even if this action were not barred for failure a claim for relief, it is clearly barrred by the controlling statutes of limitations. Plaintiff brought this action eight years after he applied to the doctoral and over eighteen months after his standing as a graduate student had been terminated. As is discussed is discussed in the Memorandum of Law, any action challenging the University' decisions must be brought as an Article -78 proceeding within the four months statue of limitations controlling such proceedings. Even if the entire action is not time-barred by the statute of limitations of Sections 213(8) and 203(f) of the Rules ("CPLR"). Plaintiff applied to the graduate program in Applied Science in October, 1983 ((Exhibit B). As early as November,

1983, when plaintiff's application was rejected, to the doctoral program was rejected, plaintiff's possessed knowledge that the Department of Applied Science had " rigorous entrance requirements" (see letter of acceptance to master program dated November 15, 1983 annexed as Exhibit C). That the Department was serious about its academic standards was further reinforced by its refusal over the next eight years to allow plaintiff to become a doctoral matriculant based on his failure to pass the qualifying examinations. The limitation to a maximum two takings of the qualifying exams was published in the 1986-88 GSAS Bulletin of March 9, 1987 (see p. 49 of the 1986-88 Bulletin attached as Exhibit E). [14] Plaintiff alleges that the putative misrepresentations were made prior to his enrollment in the masters program in Applied Science in spring term, 1984 (Complaint ¶¶8, 75, 77). The action was filed on or about November 4,1991. Thus putative misrepresentations would have to have occured more than six years before the action was commenced and their purported falsity could have been discovered with reasonable diligence over two years before plaintiff sued.

20. Plaintiff's standing as Science was terminated by decision of Department faculty in Mach, 1990 on the basis of academic judgment. The issues raised by plaintiff's 1990 grievance were reviewed and rejected as groundless in a grievance procedure conducted by GSAS administration.

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[14] Previous bulletins stated that the exams could be taken no more than three times (see p. 53 of the 1984-86 GSASG Bulletin, Exhibit R). Even this statement would not give a student the " right " to retake the exam three times as alleged by plaintiff (Complaint ¶ 35). It is merely a limit on the number of times the exam could be taken.

Plaintiff's new attempt to raise these same issues in an action at law can be no more successful in gaining relief against the University and its faculty.

WHEREFORE, it is respectfully requested that the defendants' motion be granted, that the Complaint be dismissed and that costs, disbursements, and attorney's fees be awarded to the University.

SIGNED
ADA MELOY

Sworn to before me this
6th day of February, 1992

BETTY J. ALLEN
Notary Public, State of New York
No. 31-4722138
Qualified in in New Yark County
Commisssion Expires Sept 31, 1992.

APPENDIX H

OPPOSITION PAPERS
(90 171)

AFFIRMATION OF
MORGAN KENNEDY
(90-115)

AFFIRMATION
Docket No. 91 CIV. 7457
(SWK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, and JOHN BRADEMAS, as president of New York University,

Defendants.

MORGAN KENNEDY, an attorney admitted to the District Court for the Southern District of New York, affirms under the penalties of perjury and says:

OUR OBJECTIONS TO THIS MOTION

1. I wish to briefly make a record on our oral objection to this motion, and the Court's oral order allowing this motion. At the first conference before Your Honor on January 24, 1992, I showed Your Honor the stipulation in Exhibit A. This

stipulation was drafted and signed by Ada Meloy, of counsel to the N.Y.U. defendants, and was filed by Ada Meloy. The Court so ordered this stipulation. Ada Meloy stipulated:

> "... that the time for Defendants to move, answer or otherwise respond to the Complaint is extended to and including December 13, 1991." (Exhibit A).

As of the January 24th conference date, N.Y.U. had still failed to answer or to move. I said it was in default pursuant to its own stipulation.

2. At the January 24th conference, I argued to Your Honor that under the express terms of the stipulation which N.Y.U. had drafted, N.Y.U. had been in default for forty-two days. I argued New York State's policy strictly upholding stipulations, and urged that because N.Y.U. had itself procured, drafted this stipulation, and had it so ordered, N.Y.U. couldn't possibly establish fraud, or mistake, which are required to set aside a stipulation.

3. Your Honor allowed N.Y.U. until February 7, 1992 to serve this motion upon me.

4. I repeat these circumstances simply to put this oral matter on the record.

LEAVE TO AMEND

5. In the event this Court dismisses any cause of action, then, in that event only, we request leave to amend.

MUST AN EDUCATIONAL CASE BE PRESENTED BY AN ARTICLE 78 IN THE NATURE OF MANDAMUS EXCLUSIVELY? WOULD AN ARTICLE 78 PROCEEDING EVEN BE AVAILABLE, GIVEN PLAINTIFF'S INVOCATION OF A REMEDY FOR MONEY DAMAGES ONLY?

6. Binding New York precedent, and the general rules of mandamus, show the error of N.Y.U. s argument about the exclusivity of the article 78.

7. Binding and creditable New York precedent shows that an aggrieved student may choose his own remedy, and succeed if the merits are with him. In **Tedeschi v. Wagner College, 49 NY2d 652,** cited and quoted from in N.Y.U.'s memorandum of law at page 8, the summary prepared by the Court of Appeals characterized Tedeschi's complaint. It was not an Article 78. The Court of appeals noted that plaintiff had commenced an "action" **(49 NY2d at 653).** In New York, article 78's are routinely called special proceedings, rather than actions. The Court of appeals wrote:

> "She asked for an order reinstating her and for damages." **(49 NY2d at 653).**

8. Not only was Tedeschi's chosen remedy available to her, but the Court of Appeals reversed the lower court's dismissal of the complaint **(93 Misc. 2d 510),** which dismissal had been affirmed by the Appellate Division **(70 AD2d 934).** The Court of Appeals granted reinstatement, unless a hearing was accorded **(49 NY2d at 662).** The trial court had disposed of Tedeschi's claim for money damages after trial, finding " ... that she had failed to prove damages." **(49 NY2d at 653).** The Court of Appeals did not alter that finding **(49 NY2d at 661-662).** Relief was granted in a case not brought pursuant to article 78.

9. The essence of **Tedeschi** holds that an aggrieved student may proceed under contract:

> "... the [Appellate Division] dissenters reasoned that the relationship between a college and its students is contractual and that

the college was bound to follow its own rules. *** we agree with the dissenters below that the college has not conformed to the procedure its guidelines prescribed and that plaintiff is entitled to have it do so. We, therefore, reverse." **(49 NY2d at 657).**

10. In the first and second causes of action, plaintiff proceeded solely on contract, urging that N.Y.U. retroactively changed its rules, and applied them to pre-enrolled students such as plaintiff (Exhibit C, verified complaint). This is a recurring situation:

> " - A student has progressed substantially toward his anticipated degree when the school changes its degree requirements, and even imposes them retroactively upon currently enrolled students. " **(37 Ohio State Law Journal 608, 610-611, Consumer Protection and Higher Education Student Suits against Schools).**

To remedy this common consumer complaint,

> " Contract law is the basis of the claim most often relied upon by students suing their college or university. *** The terms of the contract are usually said to be found in school catalogues, bulletins, and other printed material, representations of school agents, and customs and traditions." **(Id., 37 Ohio S. L. Journal 611-612).**

Plaintiff's claim fits contract theory well, because the essence of his first cause of action involves a change in the exam rules.

> "The more concrete, quantifiable aspects of the student school relationship fit contract analysis very well and would likely be included in any contract found to exist. These include tuition

and fee charges, specific course offerings, requirements to be met to obtain a degree..." **(Id. at 613).**

11. In **Garg v. Albert Einstein College of Medicine, 747 F. Supp. 231,** the court observed:

> "Moreover, New York Courts have reviewed educator s academic decisions where the plaintiff has alleged that the school officials failed to adhere to the school s regulations or policies and have therefore breached a contract entered into wiuth the students." **(747 F. Supp. 231, 236).**

Garg was cited by N.Y.U. (N.Y.U. memorandum of law at 6).

12. In **Gertler v. Goodgold, 107 AD2d 481,** a college professor claimed that he had been stripped of the perquisites of his office. He alleged breach of contract, and interference with contractual relations **(107 AD2d at 483).** He was allowed to proceed under breach of contract, but on the merits, the Court found that:

> "The university has never expressly, by contract or otherwise, obligated itself to provide the amenities plaintiff claims." **(107 AD2d at 481).**

Only because there had been no contract was an Article 78 available to treat the facts he alleged.

13. The Supreme Court has entertained a variety of causes of action from aggrieved students. **In Regents v. Ewing, 474 U.S. 214,** the causes of action were "whether the University's action deprived Ewing of property without due process of law." This claim was decided on the merits after trial.

> " The district Court concluded that the evidence did not support either Ewing s contract claim or his promissory estoppel

claim under Michigan law." (**474 U.S. at 219-220).**

In **Bd. of Curator's, Univ. of Missouri v. Horowitz, 435 U.S. 78**, the student proceeded under 42 U.S.C. 1983, claiming a deprivation of procedural due process (**435 U.S. at 79-80).**

14. The 4 month statute of limitation (CPLR 217) only applies to Article 78 proceedings. N.Y.U. argues that one must look to the essence of the action, not to its mere name (N.Y.U. Memorandum of Law at 22). Could this action for money damages even be bought as an Article 78? The law on Article 78 dictates that plaintiff could not have brought this claim as an Article 78.

15. Plaintiff only sues for money damages for breach of contract and for fraud. His ad damnum clause seeks no injunctive relief. He seeks no order, in the nature of mandamus, directing N.Y.U. to grant him particular relief. His wherefore clause solely asks for money damages (Exhibit C, verified complaint).

16. The first and second cause of action are framed in contract, and are posited upon the College's change of the rules governing examinations. A college student pays his school substantial sums during the period of his studies. The college, on enrolling him, accepts his money. This is a bargain, often underwritten with federally guaranteed loans. Frequently, a contracting party proceeds by an Article 78. May he do so? No, he is limited to an action at contract:

> "No doubt it is a correct general proposition that article 78 proceedings in the nature of mandamus do not lie to enforce private rights based on contract." (**Pauk v. City Univ. of N.Y., 111 AD2d 17, 20 [lst Dept. 1985]; aff'd., 68 NY2d 702).**

" Mandamus relief, pursuant to CPLR article 78, may not be used when there are other available remedies at law as, for example, an action to recover damages for breach of contract." (**Mtr. Corbeau Const. Corp. Bd. of Educ., 32 AD2d 858).**

" The principle is well established, and has often been reaffirmed, that violation by a governmental official or agency of a contractual obligation gives rise to a plenary action for violation of the contract, and not to an article 78 proceeding seeking nullification of the governmental decision." (**Goodstein Const. v. Gliedman, 117 AD2d 170, 176, Concurring opin. Sandler [1st Dep t. 1986]).**

" Mandamus relief is generally inappropriate where a plenary action is available to recover damages for breach of contract." (**Great Lakes v. Wagner 46 AD2d 721, 722).**

"A contractual right, however, cannot generally be enforced against a a governmental entity in a CPLR article 78 proceeding even when the relief sought is limited to payment of a debt rather than restitution for the loss of an opportunity to perform services. The injured party must bring an action at law...." **(Mtr. Golomb v. Bd. of Educ., 92 AD2d 256, 261).**

17. Petitioner solely asks for money damages. Article 78's section on judgments **(CPLR 7806)** provides:

> "Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner..."

In the usual case brought by a discharged governmental employee, this means that when the

court directs his reinstatement, it may also award him salary arrears. What is the primary relief which plaintiff demands? He solely asks for money damages. He would be forbidden to present this claim for money damages, only, in an article 78:

> " Damages may not be awarded in this proceeding because damages, if any, would not be incidental to primary relief (CPLR 7806). This determination is without prejudice, of course, to any other action petitioners may be advised to take." **(Mtr. Schwab v. Bowen, 41 NY2d 906, 908).**
>
> " a petition to recover such salary is by nature one to recover damages for breach of contract and that a judgment for such damages alone cannot be made under CPLR article 78." **(Mtr. Golomb v. Bd. of Educ., 92 AD2d 256, 256-57).**
>
> " The Court of Appeals, however, has held that the prohibition against an article 78 judgment for damages alone is more than a matter of mere procedure." **(Id., 92 AD2d at 260).**
>
> " Petitioner also asserts a claim for money damages in the amount of $2,000,000, claiming that his civil rights were violated and that he was denied-equal protection of the law in this proceeding. A claim for money damages in an article 78 petition must be incidental to the primary relief sought (CPLR 7806). Since petitioner's civil rights claim for money damages is not incidental to the question of whether his guilt of the traffic violation was

supported by substantial evidence, it may not be sustained in this proceeding .. and is, accordingly, denied and dismissed."
(Mtr. Reape v. Adduci, 151 AD2d 290, 293 [1st Dep t. 1989]).

" Initially, we note that petitioner s causes of action seeking monetary damages for alleged violation of section 1985 of title 42 of the United States Code are all independent causes of action not incidental to the primary relief of annulling the determination of the Civil Service Commission. As such, damages may not be awarded in this proceeding (CPLR 7806)." **(Mtr. Lessner v. Bahou, 97 AD2d 860, 860-61).**

18. N.Y.U. argues the exclusivity of article 78 as a remedy and the 4 month limitation. But as **Tedeschi** establishes, a student may select alternative remedies.

19. As the article 78 proceedings involving contracts indicate, the mere existence of a contractual remedy will make the article 78 remedy unavailable. There are thousands of cases in a which an article 78 petitioner also possesses a different remedy. The petitioner who possesses several possible remedies is precluded from using article 78. Under the established doctrine in this field, supra, a student may proceed under contract:

" Mandamus to compel, like any prerogative writ, will generally be denied if there is an adequate remedy at law." **(Jospeh M. McLaughlin, Practice Commentaries,**

McKinneys Cons Laws, CPLR 7801, C:7801:4, p. 31).

" Whether the proceeding be considered as one for prohibition or for mandamus, it does not lie when there is available another adequate remedy...." (Mtr. Morgenthau v. Roberts, 65 NY2d 749, 751).

"In light of the reluctance to interfere with the normal, orderly administration of justice, an important factor is the adequacy of other legal remedies to correct the asserted errors... " Mtr. Morgenthau v. Erlbaum, 59 NY2d 143, 147).

" The existence of another and adequate remedy in petitioner's action for declaratory judgment ... would render unavailable similar relief sought in this article 78 proceeding." (Mtr. Nash v. Gay Apparel Corp., 9 AD2d 758 [1st Dep't. 1959]; modif. on other grounds, 8 NY2d 978).

" It is settled law that the extraordinary remedy either of prohibition or mandamus lies only where there is a clear legal right and will not lie if there is available an adequate remedy at law, of which appeal is but one...." (Mtr. De Jesus v. Armer. 74 AD2d 736, 737).

" It has long been held that mandamus is a drastic and extraordinary remedy and lies only to compel the performance of an official duty clearly imposed by law where there is no other adequate specific remedy" (Mtr. Fried v. Fox, 49 AD2d 877, 878).

" Furthermore, these writs would not issue where another remedy was available or provided by law." (Mtr. **Mangano v. Altmeyer, 32 Misc. 2d 841, 842).**
" Mandamus is not to be utilized when there are other available remedies...." (**Firefighters Assn. v. Beekman, 104 Misc. 2d 829, 839; aff'd., 52 NY2d 463).**

Plaintiff was entitled to choose the remedy he thought most suitable, since neither form was exclusive (Mtr. **Chase v. Boisevert, 78 Misc. 2d 1061).**

20. Article 78 relief in the nature of mandamus would not constitute a complete and adequate remedy for plaintiff. Under the prevailing procedure in article 78, the vast bulk of the petitions are decided by a judge on the papers submitted by both parties, without the taking of any evidence. In the vast bulk of article 78 proceedings, no trial is held and no witness is ever sworn. In this federal action, plaintiff has requested a trial by jury. That right has great significance to plaintiff. At the trial of this action before a jury, plaintiff will only have to establish his causes of action by a preponderance of the credible evidence. Plaintiff's burden will be to establish his causes of action, and also to show justiciability, since he sues a college.

21. In contrast, under article 78, it is unlikely that a trial would-ever be held, and plaintiff would lose his right to a jury trial. A state court judge would decide his case on the papers. Mandamus is an inadequate remedy, because plaintiff could establish his case by a preponderance

of the credible evidence, and still be denied relief in the discretion of the judge deciding his case:

> "A proceeding pursuant to article 78 ....cannot be considered as an adequate remedy, for the absolute right of plaintiff to retirement might be denied him in such a proceeding pursuant to the inherent discretion of the court to grant or withhold relief on mandamus."
> **(Underhill v. Valentine, 267 App. Div. 778).**

> " Moreover, relief under article 78 in the nature of mandamus is in the discretion of the court...." **(Lewis v. Mdeville, 107 N.Y.S.2d 865, 867).**

> "... yet, even then the right to mandamus would be discretionary with the court."
> **(Mtr. Flynn v. Ensign Ribbon Burners, 188 Misc. 422, 424).**

" Mandamus, of course, is an extraordinary remedy which is available only in limited circumstances." **(Klosterman v,. Cuomo, 61 NY2d 525, 537).** Plaintiff strongly prefers the burden of proof by a preponderance of the evidence. This case has due process implications, because the respective procedures are so dramatically different. N.Y.U. terminated plaintiff as a student, although he was an exemplary student. His transcript (Exhibit B) shows that he maintained an A average in all the courses he took for his masters and his doctorate. Plaintiff is reluctant to return to N.Y.U. and believes that he was badly treated. He seeks money damages only, and his ad damnum clause does not seek reinstatement as a student.

22. Because of **Tedeschi**, plaintiff may resort to his inherent, established right to present a contractual claim. Because of his claim in contract, plaintiff was precluded from resorting to CPLR article 78. Plaintiff solely demands money damages, which renders CPLR article 78 relief unavailable, as the damages are not incidental to his primary claim. His primary claim is for money damages. Plaintiff always possessed a contractual remedy, which made article 78 relief unavailable. Because article 78 was unavailable to present this same claim, the 4 month statute of limitation has absolutely no application.

23. That students proceeded by article 78 in other cases hardly establishes that article 78 precludes action in contract. All the doctrine in this area shows that contract is the student s principal remedy.

THE FRAUD LIMITATION

24. The specific fraud limitations (**CPLR 203, subd. [f] and CPLR 213, subd. (8])** must be read together with the general provision on the accrual of causes of action, **CPLR 203, subd. [a])**:

> " (a) Accrual of cause of action and interposition of claim. The time within which an action must be commenced *** shall be computed from the time the cause of action accrued to the time the claim is interposed."

A litigant cannot successfully commence an action if an essential element of his cause of action is not present.

25. In essence, N.Y.U argues that plaintiff was required to commence suit upon publication of the 1986-1988 bulletin, which came out of March 9, 1987, because it provided:

attention was directed to this specific provision. Third, even if he had received it, he would not possess a cause of action, because he had not been damaged yet. Fourth, his department assured plaintiff that he could take the qualifying exams an indefinite number of times. It lulled him into believing that this provision would not apply to him. Plaintiff was a pre-enrolled student who had been studying at N.Y.U. s graduate school for several years. Nothing in the 1986-1988 bulletin stated that this changed rule could be applied retroactively to pre-existing students.

26. A calendar is useful to put this into perspective.

March, 1983	Under the specific rules of this department (Exhibit D) a student could take the qualifying exams "as often as possible."
Spring, 1984	Plaintiff enrolls in this department as a masters student
3/11/85	1984-1986 bulletin, providing: "the examinations may be repeated no more than 3 times." Plaintiff had earned 27 credits as of the end of the fall, 1984 term (see transcript, exhibit B) (bulletin in defendants exhibit R).
3/9/87	1986-1988 bulletin, providing, "The written examination may be taken no more than two times." The transcript (Exhibit B) shows that plaintiff had completed 78

> credits at the end of the Fall, 1986 term (bulletin in defendants exhibit E).

This 1987 change, reducing the times the test could be taken, occurred after plaintiff had completed all 72 credits required for his Ph.D.

27. [F]raud without damage gives no cause of action either in law or equity. *** In other words, the action of deceit is based on fraud and damage, and both must concur for the action to lie. " [D]amage is an essential element of a cause of action pleaded on fraud and deceit. " **(60 NY Jur. 2d section 164, Fraud and Deceit, p. 683; 684).** Damage is one of the five elements of fraud **(60 NY Jur. 2d section 223, Fraud and Decit).**

28. The error in N.Y.U. s argument is that they make a blunt argument presuming that plaintiff must have necessarily seen the relevant 2 lines in the thick 1986-1988 bulletin, and N.Y.U. makes no attempt to discern when plaintiff was damaged. There is no evidence that he was damaged on March 9, 1987 with the 1986-1988 bulletin. He remained in the school as a matriculated student who was continuing his last six credits (Exhibit B, transcript). Upon the publication, he was not sanctioned in any way.

29. Plaintiff s cause of action accrued when he sustained damage.On March 8, 1990, defendant Gabriel Miller wrote to plaintiff:

> " At a meeting on March 8, 1990 the faculty voted not to allow you to take the Ph.D Qualifying exams in May, 1990. "(Exhibit E).

Defendant Martin I. Hoffert wrote on March 20, 1990,

"... a decision was reached terminate your standing as a graduate student in our department." (Exhibit E)

Dr. Hoffert represented to plaintiff that he could retake the qualifying exams an indefinite number of times. Hoffert also indicated that this change was not because of the 1986-1988 bulletin, but was solely because of a faculty vote:

" I recognize that in prior years I had informed you that you would be permitted to take the Qualifying Exams an indefinite number of times; however this policy has been changed by vote of the Faculty." (Exhibit E).

This Department had its own particular rules. The 1984-1986 bulletin (Defendants' ex. R) provided that the exam could be taken 3 times, but Hoffert had told plaintiff he could do so an " indefinite number of times. " The 1986-1988 catalogue was not the reason for the change; "vote of the faculty" caused the change.

30. Prior to the said two letters, plaintiff had not sustained any damage.

31. To succeed on this point, N.Y.U. would be required to prove two points. First, to show discovery in 1987, it would have to show that in 1987, plaintiff saw the specific two lines in the 1986-1988 bulletin, and these two lines put him on notice, despite the fact that the chairman, Dr. Hoffert had assured him he could take the exams an indefinite number of times. Second, N.Y.U. would have to show that he was damaged in 1987, although he

continued taking courses. N.Y.U. has produced no evidence to show he was damaged in 1987, and N..Y.U. possesses his entire school file. He did not possess a cause of action in fraud in 1987. It urges 1987 discovery upon a series of presumed facts. Those presumptions should await discovery. Those lawyer's presumptions fail to establish anything as a

THE THIRD CAUSE OF ACTION ON FRAUD

32. **Specifications of the Acts Committed by Individual Defendants.** The Complaint (Exhibit C) pleads the rulemaking changes made (parag. 86; 96) and it was defendant N.Y.U., and non-party the Department of Applied Science which made and applied these changed rules. It pleads that plaintiff sought to renew his matriculation, but defendant Kazemi refused to allow him to matriculate (parag. 91).

33. It pleads that " 90. After the December, 1989 examination, the Department of Applied Science expelled him from the said department." This third cause of action incorporates all the other allegations preceding it. Under the second cause of action it alleged:

> " 29. In a letter to plaintiff plaintiff dated March 8, 1990, Gabriel Miller, denied plaintiff any further opportunity to re-take the written examination in physical and chemical science, stating: At a meeting on March 8, 1990 the faculty voted not to allow you to take the Ph.D. Qualifying exams in May, 1990.

31. In a letter to plaintiff dated March 20, 1990, Martin I. Hoffert, the chairman of the Department of Applied Science, advised plaintiff that a decision was reached to terminate your standing as a graduate student in our Department." It is that action by those two defendants which is alleged under paragraph 90, stating that plaintiff was expelled.

34. Plaintiff would not be adverse to limiting the defendants under the third case of action to N.Y.U., and the two defendants (Hoffert and Miller) who forced plaintiff from the department.

35. The evidence (Exhibit E) shows a specific admission of prior representations. Chairman Hoffert's March 20, 1990 letter to plaintiff terminated his standing as a graduate student,and admitted to relevant representations, unfullfilled in a secret faculty vote:

> "I recognize that in prior years I had informed you that you would be permitted to take the Qualifying Exams and indefinite number of times; however this policy has been changed by vote of the Faculty."

This was a specific representation made to plaintiff; it proved false.

36. Director of Graduate Studies Gabriel Miller wrote to plaintiff on March 8, 1990, denying him any opportunity to retake this exam (Exhibit E).

37. " In case of doubt whether a representation amounts to a phophecy

of what will occur in the future, the question is one which should be passed upon by a jury." **(60 NY Jur.2d 36, p.481).**

"... a statement of present intention is deemed a statement of material existing fact, sufficient to support a fraud action."**(Channel Master v. Alum. Ltd., 4 NY2d 403, 407)**

"Proof of failure to keep a promise may tend to establish the intent not to keep it..." **(Adams v. Clark, 239 N.Y. 403, 410).**

38. **F.R.C.P. 9[b]** must be read together with **F.R.C.P. 8[a],** which calls for short and plain statements **(DeVittorio v. Equidyne, 822 F. 2d 1242 [2d Cir. 1987]).** A principle purpose of **9[b]** is to provide fair notice, to enable preparation of a defense **(Id.).** Plaintiff only possesses some relevant documents from his student career, and he is limited because much of of the factual information needed to fill out his complaint lies peculiarly within defendant's knowledge **(Id., page 1248).**

39. At the bottom of the bulletin cover, in very small print, near the the roman numeral volume number and the postmaster instructions, N.Y.U. stated:

> "Notice. The programs and requirements set forth in this bulletin are necessarily subject to change without notice at any time at the discretion of the administration."

On the interior, program and requirement rules are stated in clear and definite terms. As it happens, plaintiff never saw this tiny typed reservation. This reservation of rights was never stated to him any

other way. N.Y.U.'s reservation of the right to change and modify itself showed the falsity of the representations it made elsewhere. The programs and requirements of established students with federally guaranteed loans could be changed at whim, "without notice at any time."

SUMMARY JUDGMENT

40. We oppose summary judgment. At the January 24th conference, N.Y.U. failed to mention a summary judgment motion.

41. The New York Courts forbid summary judgment motions in lieu of an answer. First, issue must be joined with an answer **(CPLR 3212 subd. [a])**. New York courts favor substantial discovery prior to the making of a summary judgment motion. Defendants have not answered yet. There has been no discovery, as issue is not joined.

42. Plaintiff was a matriculated doctorate student. The N.Y.U. departmental documents in Exhibit F assured plaintiff that he was a Ph.D student, and advised him that he had completed the coursework for the Ph.D. degree. N.Y.U. now disagrees, and says he was never matriculated as a Ph.D. student. 32 credits were required for the masters. N.Y.U. enrolled plaintiff in 52 credits after he completed his masters, which credits he completed with A's. This Court should emphasize the departmental letters in Exhibit F, and determine that he was a matriculated Ph.D. student. As the letters show, when the department terminated plaintiff, his status was as a matriculated Ph.D. student who had successfully completed all the coursework for the Ph.D.

43. This is a college rules case, instead of a case in which a student attempts to have a grade changed. Courts are concededly reluctant to interfere with academic relationships, but they do hold schools bound to enforce their own rules, as **Tedeschi v. Wagner College, 49 NY2d 652,** indicates:

> " Plaintiff argues, and the dissenters in the Appellate Division agree, that the student private college relationship is contractual and that it is an implied term of the contract that rules such as the Wagner College Guidelines will be adhered to by the college. " **(49 NY2d at 652).**

" Good faith, i.e., not to act arbitrarily" **(49 NY2d at 659)** was an implied term of the contract.

44. This is not a scholarship case, involving a student who had difficulties in grades. Plaintiff was an exemplary student. His transcript (Exhibit B) shows that he always got A's in his masters and doctoral courses. Because he mastered the subject so well, it appears that his problems on the qualifying exams resulted from political problems involving him and his department. Plaintiff is a Turkish muslim, a member of a distinct minority at this school. The complaint (Exhibit C) makes no challenge against the grades he received on the qualifying exams.

45. The 1986-1988 bulletin, published on March 9, 1987 (Defendants's exhibit E) said the test may only be taken two times. This differed from the indefinite number of times, that Chairman Hoffert had offered him, the three times provided for in the 1984-1986 bulletin, and the March, 1983

departmental rules, which said the test "may be taken as often as possible." (Exhibit D).

46. Plaintiff had completed 78 graduate credits at the end of the Fall, 1986 term (Transcript, Exhibit B). Only 72 credits were needed for the Ph.D. After he completed the necessary 72 credits, his school suddenly changed the rules, and allowed students only two opportunities to take these exams (1986-1988 bulletin, published March 9, 1987).

47. This bulletin was ambiguous. It never stated whether it applied retroactively to students in the pipeline, or prospectively, to new students only, or whether it applied to every student. The bulletin made no mention.

48. This was a contract of adhesion, drafted by the university without the consent of its students who were paying tuition to this university, with the assistance of the federal government. After this plaintiff had successfully completed 72 credits needed for the Ph.D., as a matriculated Ph.D. student, the university suddenly revised its rule, and terminated plaintiff in reliance upon this suddenly changed rule. This was an elaborate vendor-vendee relationship, in which the vendor reserved exclusive power to retroactively modify the degree requirements. A jury could well find that this is reasonable, and find that this retroactive application was not in good faith.

49. This constitutes an issue of fact, since it involves the reasonableness and good faith of N.Y.U.'s action:

> "[W]e find that an issue of fact is presented as to whether defendant acted in good faith in

denying plaintiff's request for transfer credits in fullfilling the requirements for a doctorate degree." **(Morales v. N.Y.U., 83 AD2d 811, 811-812 [1st Dep t.]; aff d., 55 NY2d 822).**

" While a few courts may still indulge in a presumption that schools have acted reasonably, the present majority view seems to be that reasonableness is a question of fact." **(72 Yale L. Review 1362, 1375).**

The reasonableness and the good faith of a defendant's acts routinely present jury questions. We resent N.Y.U.'s patent attempt to convert this action into an abbreviated summary proceeding, as its counsel fraudulently asserts that plaintiff was never a matriculated Ph.D. student, although departmental documents show otherwise (Exhibit F).

50. This case does not involve scholarship difficulties as did **Matter of Susan M. v. Law School, 76 NY2d 241**. Since Tedeschi, a school's rulemaking and its adherence to its own rules has presented a judicially cognizable claim. This involves the school's modification of its own rules, and its application of the new rule to pre-existing students well on their way to a degree. Plaintiff was terminated based on a suddenly changed rule.

51. Chairman Hoffert s letter (Exhibit E) indicated that the March 9, 1987 bulletin change was not the reason plaintiff was terminated. Hoffert maintained that faculty vote dictated his termination. We wish to depose Hoffert on this question, as plaintiff knows nothing about this faculty vote. The record also indicates that the department had distinct rules.

Hoffert had told plaintiff he could take the tests an indefinite number of times, although the 1984-1986 bulletin (Defendants' ex. R) prescribed only 3 times. We wish to depose him on this. The bulletins were always silent about prospective application, or retroactive application to pre-existing students. This rule change was retroactively applied to a pre-existing student. We seek discovery on the actual practice.

52. N.Y.U. has made repeated reference to plaintiff s written grievances. He made several, addressed to different officers. The Grievance procedures (Exhibit G, p. 108-109) were violated by N.Y.U. An appeals officer was required to meet with him, ascertain the facts, and report; it never happened. There was a University Judicial Board; plaintiff's appeals were never referred there. In this academic situation, no N.Y.U. personnel met with him to mediate this dispute. When the undersigned contacted N.Y.U.'s legal department to mediate this dispute, prior to drafting the complaint, the legal department by Ada Meloy was disinterested and she did decline.

53. Plaintiff's summary judgment exhibits are limited, as he does not have possesion of his school file, there have been no depositions, nor any documentary discovery. The complaint is verified, under oath, so it should be accepted as an additional affidavit. N.Y.U. possesses plaintiff's entire school record. That is not available to plaintiff. We had no opportunity to pick and choose what papers we might like from his file. N.Y.U. could have submitted affidavits from its professors, rather than proceeding on Ada s Meloy s papers exclusivlely.

54. In conclusion, the transcript shows that plaintiff was an excellent student, who maintained an A average in his 84 credits of graduate courses. His mastery of this subject seemed so concrete, that his failure on some qualifying exams seems absolutely unexplainable. The transcript shows that his scholarship was attested to by this entire department, which consistently gave him A's. He was an excellent student who should have naturally passed these qualifying exams, as he had in all his classroom tests. This was an introductory test, rather than a terminal test. Something more was present. Plaintiff alleged under oath:

> " 81. Plaintiff took the qualifying examination in physical and chemical science is November, 1984. The professor who graded the said examination gave plaintiff a passing grade of 60.
> 82. Thereafter, Gabriel Miller overruled the grading professor, and changed plaintiff's grade of 60 into a failing grade of 51.
> * * *
> 85. The grades for the qualifying examination were all finalized in a meeting in the Department of Applied Science. Under the practice in effect at those meetings, students with [bad grades] were occasionally deemed to have passed on the qualifying examination."

This is offered in explanation. Grading was an inherently subjective and arbitrary process; of two different students with the same grade, one might

pass and another might fail. These are reasons why plaintiff failed an introductory test, although he had mastered all the coursework with an A average.

55. We ask for counsel fees as N.Y.U. has done. On her article 78 exclusivity point, Ada Meloy ignored **Tedeschi**, although she cited it herself, and she-ignored the pre-eminent doctrine in this area allowing contract claims by students. Ada Meloy positively misrepresented the facts to this court. She maintained that plaintiff was not a matriculated Ph.D. student. But all the departmental letters in Exhibit F prove that plaintiff was a matriculated Ph.D. student. Finally, she consistently characterized plaintiff as a very poor student, when his transcript shows that he had a consistent A average. Ada Meloy has positively misrepresented the record. Some of her defenses were frivolous.

CONCLUSION

56. This motion should be denied.

Respectfully submitted,

MORGAN KENNEDY - 7582
Attorney for Plaintiff
133 East 15th Street
New York, N.Y. 10003
(212) 228-3269

APPENDIX H-1

AFFIDAVIT OF
RESAT KELES
(116-123)

AFFIDAVIT
Docket No. 91 CIV. 7457
(SWK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILLER, DR. FERHAD KAZEMI, and JOHN BRADEMAS, as president of New York University.

Defendants.

RESAT KELES, being duly sworn, deposes and says:

1. I am the plaintiff.

2. I was entitled to choose the particular remedy which suit me best. I chose to do this action for damages. I did not want to have an article 78 proceeding, because that would prejudice me. Article 78 s are decided on the papers by a judge, just like a motion. In article 78's, there is no trial and there is no jury. I wanted to have a trial by jury, with sworn witnesses, because I believe in that method. I didn't

want my case to be decided by a judge, but I wanted it to be decided by the jury.

3. I know that there is free discovery in federal court. In article 78's, discovery is almost non-existent. Article 78 is an extraordinary remedy, and it is very limited.

4. In an article 78, I could present a very strong case and relief might still be denied to me, because relief is discretionary in article 78's. In a regular civil action, I would win by presenting a preponderance of the evidence.

5. I have done some legal research involving students' cases. Students have always been allowed to present contract claims. I know that students in the past have been allowed to sue in regular civil actions for money damages. **Tedeschi v Wagner College, 49 NY2d 652**, was a regular civil action for money damages. It definitely was not an article 78.

6. My complaint (exhibit C) just asks for money damages.

7. The rule in my department was that the qualifying exams could be taken an indefinite number of times. This was what the department's written rules stated (EXhibit D) and it was what the Chairman personally told me (Exhibit E).

8. Chairman Hoffert always told me that I could take the qualifying exams an indefinite number of times (Exhibit E). That satisfied me, and I didn't investigate this issue any further. I don't think I received a copy of the 1986-1988 bulletin. I am now told by counsel that 2 lines in that book said that one could only take the qualifying exams two times. I never read those two lines. People never read every page of the bulletins. I know I did not.

Anyway, this department had many unique rules of its own that were different from the general school rules.

9. No one in the department every discussed this two test rule with me. No one in the department ever drew my attention to these lines in the 1986-1988 bulletin. But Chairman Hoffert did tell me I could take the qualifying exams an indefinite number of times. I believed him, because he was the department's Chairman. Hoffert never told me that there had been any change in the rules.

10. Counsel tells me that the 1986-1988 bulletin was published on March 9, 1987. On or after March 9, 1987, N.Y.U. did not sanction or terminate me at all. To the contrary, I continued as a matriculated student, and successfully completed 6 more credits of courses. After I completed these 6 credits, I maintained my matriculation for several semesters. In sum, I was not damaged in any way around the time of this 1986-1988 bulletin. I was damaged in 1990, when the department refused to permit me to take this exam ever again; I was damaged in 1990 when N.Y.U. terminated me from the graduate school (Exhibit E). This action was started with 6 years after I was terminated in 1990 .

11. I had 78 credits of graduate courses (masters and doctorate) when this 1986-1988 bulletin came out on March 9, 1987. This new rule was applied to me, after I had completed all 72 credits of coursework, with A grades, required for my doctorate (Exhibit B, transcript).

12. I was just referred to the cover of the 1984-1986 bulletin, and I was pointed to the tiny type on the bottom, where N.Y.U. says it could change any rule, anytime, at its sole discretion. Well, N.Y.U. wrote this so small and placed it where hardly

anyone would bother reading it. I personally know that I never read this. I didn't pay any attention to the bulletins, because I was too busy studying difficult material. I always understood that the college rules in existence at the time of my initial enrollment constituted an important part of my contract with the college.

13. I suppose some rules changed sometimes. But when a rules change was important, N.Y.U. only applied the new rule to incoming students. It did not apply new, changed rules to students like me, who had studied there several years. I was close to obtaining my degree - I had completed the required 72 credits of courses for the Ph.D. In addition, I had already passed the mathematics qualifying exam, and the language qualification (Exhibit H). The chairman admits that he told me I could take the qualifying exams an indefinite number of times. I continued on, and completed 84 credits. I was an excellent student and I had an A average for all 84 credits (Exhibit B, transcript).

14. The N.Y.U. bulletins were ambiguous. They never spoke about prospective and/or retroactive application of new rules.

15. N.Y.U. never took any student vote when it wanted to change a rule, even though students were paying for their education with federally guaranteed loans. This was not good faith. N.Y.U. was behaving capriciously and undemocratically.

16. I do not have copies of my N.Y.U. school file. N.Y.U. had 2 separate files concerning me, the Dean s file, and the department file. I just have copies of several papers. N.Y.U. possesses both of my

complete student files. Those 2 files are unavailable to me and to my lawyer.

17. I filed a few different written grievances after I was terminated (Exhibit G) but no appeals officer ever personally met with me to discuss my grievance. There was also a University Judicial Board, but no one ever spoke to me about going there. The N.Y.U. grievance rules required this procedure (Exhibit G). In fact, N.Y.U. personnel told me that they refused to follow the grievance procedure in my case. Before we started this lawsuit, my attorney wanted to meet with the N.Y.U. legal department. He thought that a settlement could be worked out in a meeting, so a lawsuit would be unnecessary. N.Y.U. first asked that I sign a paper authorizing my lawyer to speak with them (Exhibit G). I signed it. Surprise of surprises, then the N.Y.U. legal department refused to meet with my attorney. This action was started after that. The Deans always set up a permanent grievance committee made up of several professors. My grievances were never submitted to that grievance committee for review. This Dean's committee was not mentioned in the written Grievance.

18. My transcript shows that I maintained an A average for 84 graduate credits (Exhibit B). I worked hard to master this material and I did very well in all the ciass examinations. With an A average I should certainly have been able to pass the qualifying examinations. I believe that one or two of the defendants personally decided that the Ph.D. degree should be kept from me. Subsequently, a distinguished engineering professor, Dr. Alan T. McDonald, who authored many engineering textbooks, differed with N.Y.U. Dr. McDonald saw my December, 1989 exam paper, and he stated that I

should have been given a passing grade of 70, instead of the 56 which I was actually given. Exhibit I consists of Dr. McDonald's opinion, his resume, the cover of a book he authored, and the test book which Dr. McDonald analyzed.

19. I absolutely passed two components of the qualifying exams according to N.Y.U., in mathematics and in language (Exhibit H). I actually did pass the 1984 exam in physical and chemical sciences. Professor Walter Brenner graded my 1984 exam. and he gave me a passing grade of 60. Then, after my exam was graded 60, Defendant Gabriel Miller changed my assigned grade, and said that I had a failing grade of 51. N.Y.U. recorded this failing grade of 51, instead of the passing grade of 60 which the original grading professor gave me.

20. Exhibit J consists of N.Y.U.'s proposal papers to obtain approval for a Ph.D. program in applied science from the State Education Department. On page 20, N.Y.U. states that all the qualifying exams will be given orally. I am Turkish, and English is my second language. I am stronger when speaking English. I am much weaker in writing English. All these qualifying exams were given to me in written form. That these tests were given in written, rather than oral form, violated the terms of this proposal.

21. On the last page in Exhibit J, N.Y.U. told the State Education Department:

> "The [qualifying] examination may be repeated no more than 3 times."

I investigated and copied all the papers which N.Y.U. filed with the State Education Department - I personally know that N.Y.U. never obtained State Education Department approval when it decided to allow only two chances to take the qualifying exam. The proposal said 3 chances, so 3 chances it had to be.

This proposal was N.Y.U.s charter and Constitution for this program. N.YU. made major changes in its charter without consulting the State Education Department.

22. Defendants' motion should be denied. We have raised triable issues of fact, and N.Y.U. has failed to prove any of its defenses as a matter of law.

WHEREFORE, defendants motion to dismiss should be denied, with such relief as may be just.

Dated: February 20, 1992

RESAT KELES

Sworn to before me on
February 20, 1992

MORGAN KENNEDY
Notary No. 4822610
Qualified in N.Y. County
Commission expires 10/31/92

APPENDIX I

STIPULATION FOR EXTENSION TIME PREPARED BY ADA MELOY SO ORDERED BY THE COURT

91 Civ. 7457 (SWK)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RESAT KELES,

Plaintiff,

-against-

NEW YORK UNIVERSITY, DR. MARTIN HOFFERT, DR. GABRIEL MILTER, DR. FARHAD KAZEMI, and JOHN BRADEMAS, as President of New York University,

Defendants.

IT IS HEREBY STIPULATED AND AGREED by the undersigned counsel for the parties hereto that the time for Defendants to move, answer or otherwise respond to the Complaint is extended to and including December 13, 1991.

Dated: New York, New York
November 19, 1991

S. ANDREW SCHAFFER, 8628
ADA MELOY,4092

SIGNED
Attorneys for Defendants
70 Washington Square South
New York, New York 10012
2 12-998-2258

MORGAN KENNEDY, 7582

SIGNED
Attorney for Plaintiff
133 East 15th Street
New York, New York 10003
212-228-3269

SO ORDERED:

SIGNED
United States
District Judge
Dated: New York, New York,
December 6, 1991

APPENDIX J

LETTERS TERMINATING KELES FROM THE DEPARTMENT (135-136)

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury,N.Y. 11590
Tel:(516) 832-2590

March 8, 1990

Mr. Resat Keles
606 West 116th Street - Apt 24
New York, NY 10027

Dear Mr. Keles:

At a meeting on March 8, 1990 the faculty voted not to allow you to take the Ph.D. Qualifying exams in May 1990.

Sincerely,

Gabriel Miller
Director of Graduate Studies

GM:jag

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury,N.Y. 11590
Tel:(516) 832-2590

March 20, 1990

Mr. Resat Keles
606 West 116th Street - Apt 24
New York, NY 10027

Dear Mr. Keles:

Supplementing Dr. Miller's letter to you of March 8, 1990, this is to inform you that we believe that the Department has acted within its authority in changing the rules regarding permission to take the required Qualifying Exams for the Ph.D. in Applied Science.

It is with regret, therefore, that we must inform you that after careful deliberation by the faculty, a decision was reached to terminate your standing as a graduate student in our Department. I recognize that in prior years I had informed you that you would be permitted to take the Qualifying Exams an indefinite number of times; however, this policy has been changed by vote of the Faculty.

We should like to mention at this time that under Section 11 of the NYU GSAS Manual of Rules, Policies, and Procedures - "A student who believes the department has acted in violation of university policy in terminating his or her matriculation may appeal to the dean of GSAS".

Sincerely yours,

MARTIN I. HOFFERT
Professor and Chairman
Department of Applied Science

cc: Dean Robert McChesney
Graduate Recorder

APPENDIX K

VARIOUS LETTERS FROM ADMINISTRATION AND THE CHAIRMAN, CONFIRMING THAT KELES WAS A PH.D. STUDENT (137-143)

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury,N.Y. 11590
Tel:(516) 832-2590

February 28, 1986
To Whom It May Concern:

This is to confirm that Mr. Resat Keles is a Ph.D. student in the Department of Applied Science, Graduate School of Arts and Science at New York University.

As of the Fall 1985 semester, Mr. Keles has completed the coursework requirement for the Ph.D. degree.

Sincerely,

Professor Barry Rugg
Director of Graduate Studies

BR:KO

APPENDIX K-1

New York University
A public university in the public service
Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury,N.Y. 11590
Tel:(516) 832-2590

March 19, 1986

To Whom It May Concern:

This is to confirm that Mr. Resat Keles is a Ph.D. student in the Department of Applied Science, Graduate School of Arts and Science at New York University. He has completed the following courses in the Fall 1985 Semester:

Course No.	Title	Grade	Points
G12.2206	Fuel Processing	A	3
G12.2304	Turbulence I	A	3
G12.1205	Energy Sour&Uti.	A-	3
G12.1412	Policy Issues &E,	A-	3
G12.3202	Doctoral Ind.Study	A	3

Sincerely,

Martin I. Hoffert
Chairman of Applied Science
MIH:K0

APPENDIX K-2

New York University
A public university in the public service
Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury,N.Y. 11590
Tel:(516) 832-2590

June 4, 1986

To Whom It May Concern:

This is to confirm that Mr. Resat Keles is a Ph.D. student in the Department of Applied Science, Graduate School of Arts and Science at New York University. He has completed the following courses in the Spring 1986 semester:

Course No.	Title	Points	Grades
G12.3220	Earth Sys.Sci.	3	A
G12.3202	Doctoral I.Std.	3	A
G12.3203	Doctoral I.Std.	6	A

Sincerely,

Professor Barry Rugg
Director of Graduate Studies

BR:KO

APPENDIX K-3

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westby, N.Y. 11590
Tel:(516) 832-2590

March 3, 1987

To Whom It May Concern:

Mr. Resat Keles is a Ph.D. student in the Department of Applied Science at New York University. He took the following courses in the Fall 1986 term:

Course No.	/ Title	Grade	Points
G12.1222	Analytical Met. I	A	3
G12.1410	Atmo&Oceans I	A-	3
G12.3202	Independ.Study	A	3
G12.3205	Problems in En.	A	3

Please contact us if you require any further information.
Thank you.
Sincerely,

Tyler Volk
Director of Graduate Studies

TV:KO

APPENDIX K-4

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury, N.Y.11590
Tel:(516) 832-2590

June 12, 1985

To Whom It May Concern:

Resat Keles is a graduate student in the NYU Graduate School of Arts and Science,Department of Applied Science. This is to confirm that he has completed the following courses during the Spring 1985 Semester.

Course No.	Title	Grade	Points
G12.2300	Material Science	A	3
G12.2309	Solar Energy II	A-	3
G12.1306	Reaction Kine.	A	3
G12.2307	Energy trans&Stge	A-	3

Sincerely,

Barry Rugg,Assoc.Professor
Director of Graduate Studies

BR:KMJ

APPENDIX K-5

New York University
A private university in the public service

Office of Registrar
Graduate School of Arts and Science Recording Office
101 Main Building
Washington Square
New York, N.Y. 10003
Telephone: (212) 998-4858

August 23,1988

To Whom It May Concern:

This is to certify that Mr. Resat S. Keles I.D. #011-62-8809, is enrolled in the the Graduate School of Arts and Science of New York University.

Mr. Keles has completed 72 points in the Ph.D. program of the Department of Applied science.

Very truly yours,

Gloria Cobo
Recorder

GC: sd

APPENDIX K-6

New York University
A private university in the public service

Office of Registrar
Graduate School of Arts and Science Recording Office
101 Main Building
Washington Square
New York, N.Y. 10003
Telephone: (212) 998-4858

September 16, 1988

To Whom It May Concern:

This is to certify that Resat S. Keles, I.D. #011-62-8809, is pursuing the degree of Doctor of Philosophy in the Department of Applied Science of the Graduate School of Arts and Science of New York University.

Very truly yours,

Gloria Cobo
Recorder

GC: sd

APPENDIX K-7

New York University
A private university in the public service

Office of Registrar
Graduate School of Arts and Science Recording Office
101 Main Building
Washington Square
New York, N.Y. 10003
Telephone: (212) 598-3155

August 8, 1985

TO WHOM IT MAY CONCERN:

This is to certify that Mr. Resat S. Keles is pursuing the degree of Doctor of Philosophy in Applied Science at the Graduate School of Art and Science of New York University.

Yours truly,

SIGNED

(Mrs.) Mavis Lewis
Recorder

ML: sr

APPENDIX K-8

New York University
A public university in the public service

Faculty of Arts and Science
Department of Applied science
Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998 8995

Antonio Ferri Lab.,
425 Merrick Avenue
Westbury, N.Y.11590
Tel:(516) 832-2590

February 23, 1988

TO WHOM IT MAY CONCERN:

This is to confirm that Mr. Resat Keles has passed the Mathematical sciences Qualifying Examination in applied science at New York University.

Sincerely,

Gabriel Miller
Graduate Director

APPENDIX L

EXCERPTS FROM STUDENT QUIDE ON THE GRIEVANCE PROCEDURE (146-149)

Student Grievance Procedures (108-109)

Articles I, II, V,VI, and VII below shall be applicable to all of the Schools of New York University. Articles II and Article III shall also be applicable to each School unless and until a School adopts and files with the Secretary's Office procedures for the equivalent stages. To ensure compliance with the law and integration with the final appeal levels, the procedures adopted by a School shall meet the following requirements:

a. Any written document required by the procedures shall be filed with the office of the Executive Assistant to the president and the procedures shall provide that information regarding grievance procedures can be obtained there.

b. Each decision level shall render a decision to the grievant within fifteen (15) working days of the day when the matter was referred to that level and the decision of the highest decision level shall be in writing.

c. A grievant shall provide the School's highest decision body, if he or she appeals to it, with a written complaint. The complaint shall state the written policy of the School or University that has allegedly been violated, describe the facts and

evidence supporting the alleged violations, indicate what redress the grievant seeks, and provide a brief history of the attempts to resolve the grievance.

d. Every publication of the School's grievance procedure shall include this document.

I. **Coverage**: These grievance procedure are avaliable to any New York University student to resolve any grievance involving alleged violation directly affecting that student, by any member of the University community while acting in an official capacity, of any of the written policies of the University or the school in which the student is enrolled.

II. **Informal Resolution**: Students wishing to grieve an alleged violation of the University's policies shall first contact,within twenty (20) working days of any occurrence giving rise to the grievance or the time they could reasonably have learned of such occurence,the person responsible for the matter being grieved (the respondent) and attempt to resolve the grievance informally. Students uncertain about how proceed may consult the Executive Assistant to the President who shall identify the appropriate person. At the request of the grievant or respondent, the ombudsperson in the School in which the student is enrolled (if there is one, otherwise the Executive Assistant to the president) shall arrange for a meeting of the parties, attend such meeting(s), and attempt to aid in the resolution of the grievance.

III. **Formal complaint**: If the grievance is not resolved informally within fifteen (15) working

days after the grievant contacted directly the appropriate person to attempt an informal resolution, students may obtain review by submitting a written complaint within twenty (20) working days of the first direct contact to the Executive Assistant to the President, the respondent and the appropriate University appeal officer. The complaint shall state the University policy that alleged has been violated, describe the facts and evidence supporting the alleged violation, indicate what redress the grievant seeks, and provide a brief history of the attempts to resolve the grievance. The appeal officer, if the grievance arises out of a program or educational activity within a School, shall be the Dean of that School. Otherwise, the appeal officer shall be the highest ranking University officer other than the President responsible for the subject matter of the grievance. This will generally be the Vice President for Administration, External Affairs, Finance or Student Affairs, but students in doubt should consult the Director of Affirmative Action, who shall determine the appropriate appeal officer.

The appeal officer shall meet with the complainant and with such other persons as he or she deem appropriate for the purpose of ascertaining the facts and attempting to resolve the complaint, the appeal officer render a written decision on the merits to the grievant, the respondent and the Executive Assistant to the President.

V. University Judicial Board: The University Judicial Board is a standing committee of the University Senate. The Board consists of regular members all of whom are members of the Senate including the students who are chosen by the Student Senators Council; three faculty members

who are chosen by the Faculty Council, and three Deans who are chosen by the Deans Council. Any case referred to the Board shall be heard and decided by a three person panel consisting of one Senator from each constituency. Student and respondent may appeal the decision of the appeal officer to the highest decision provided for by the School in which the student is enrolled,within ten (10) working days of receiving it, by submitting the decision and the complaint to the chairperson of the University Judicial Board.

The University Judicial Board may dismiss the complaint without a hearing if it determines that there would be no violation of University policy even if the facts alleged by the grievant were true. It shall conduct such proceeding as it deems appropriate provided that:

a. it shall not consider any matters not included in the written complaint. If the committee feels the grievant did not have access to the facts necessary to make his complaint complete when first submitted, the panel of the University Judicial Board may allow the grievant to submit an amended complaint.

b. both parties shall have access to all documents submitted to the committee and shall the right to question all witnesses.

c. it shall not hold public sessions unless both parties and a majority of the panel's members agree to do so, and shall not do so without all members present, and

d. the grievant may be accompanied by another person before the committee.

The Review Board shall render a written decision within thirty (30) working days of the day it was designated, with copies to the grievant, the respondent, the Executive Assistant to the President, and the President. The decision shall include findings of facts, a statement of the policy that is alleged to have been violated, an opinion on the validity of the grievance and,if appropriate,remedial recommendations.

V. **Final Review by the President.** Any part of the University Judicial Board's decision which calls for redress for the grievant shall be subject to review and change by the President. The President shall act on the remedial recommendations, if any of the Judicial Board within fifteen (15) working days of receiving the decision.

The President's decision as to the appropriate remedy and whether the Judicial Board has accuretely determined University Policy shall be in writing and final, and copies shall be sent to the grievant, the respondent, the chairperson of the University Judicial Board, and the Executive Assistant to the President.

VI. **Time Limits.** The Executive Assistant to the President may grant extentions of the time limits under this grievance procedure up to ten (10) working days.

VII. **Record - Keeping.** The Executive Assistant to the President shall retain a copy of the complaint, any amended complaint, any decision of the hearing committee, and any decision of the President for five full calender years following the year in which the grievance is resolved.

APPENDIX M

KELES WRITTEN DEMAND FOR A GRIEVANCE HEARING

IN THE UNIVERSITY JUDICIAL BOARD

Resat Keles
606 West 116th Street
Apt. 24
New York, N.Y. 10027

July 1, 1991

Dr. C. Duncan Rice
Dean of the Faculty of Arts & Science
New York University
5 Washington Square North
NYC 10003

Dear Dean Rice:

I demand a grievance hearing pursuant to the Student Grievance Procedure of the New York University Judicial Board.

As an institution which receives very substantial federal funds, NYU is mandated to accord me Due Process hearing rights.

Very truly

RESAT KELES

APPENDIX N

VARIOUS NYU LETTERS REFERRING TO KAZEM'S INITIAL GRIEVANCE DECISION (151-153)

New York University
A private university in the public service

Graduate School of Arts and Science
Office of the Dean

6 Washington Square North, Room 12
New York, N.Y. 10003
Telephone: (212) 998-8040

August 20, 1990

Resat Keles
606 West 116th Street #24
NY NY 10027

Dear Mr. Keles,
I have received your letter of August 13th about your grievance petition regarding the Department of Applied Science. Please be informed that I see no reason to reopen the case. My decision of August 8, 1990, stands.

Sincerely,

Farhad Kazemi
Acting Dean

cc: Professor Martin Hoffert
Dean Robert D. McChesney
Professor Gabriel Miller
Dean C. Duncan Rice
Chancellor L. Jay Oliva

FK/sk

\dean\keles

APPENDIX O

NEW YORK UNIVERSITY
A private university in the public service

Elmer Holmes Bobst Library
70 Washington Square South, 11th Floor
New York, N.Y. 10012-1091
(212) 998-2244
Fax No. (212) 995-3048

Vice President and General Counsel

Mr. Resat Keles
606 West 116th Street, #24
New York, New York 10027

February 28, 1991

Dear Mr. Keles:

This letter is sent in response to your letter to President John Brademas dated February 5, 1991.

For the reason carefully articulated to you by Dean Kazemi in his letters to you dated August 8, 1990 and August 20, 1990 (copies attached) there is no basis for reopening this mater and the decisions of Dean Kazemi dated August 8, 1990 stand.

Very truly yours,

S. Andrew Schaffer

SAS: ms
Attachments

c: President John Brademas (w/attahments)

APPENDIX P

NEW YORK UNIVERSITY
A private university in the public service
Office of Legal Counsel

ELMER HOLMES BOBST LIBRARY
70 WASHINGTON SQUARE SOUTH
NEW YORK, N.Y. 10012-1091

FAX NO. (212) 995-3048

WRITERS DIRECT DIAL NUMBER
212-998-2258

Mr. Resat Keles
606 West 116th Street, #24
New York, New York 10027

July 18, 1991

Reset Keles
606 West 116th Street, Apt. 24
New York, New York 10027

Dear Mr. Keles:

Your letter dated July 1, 1991, to Dean Rice has been referred to me.

Having reviewed the letters of August 8 and 20, 1990, to you from Dean Kazemi, we see no basis for reopening this matter and the decisions of Dean Kazemi dated August 8, 1990 stand.

Very truly yours,
Ada Meloy
Associate General Counsel

AM:ltm
cc: Dean C. Duncan Rice

APPENDIX R

NYU DOCUMENTS KEPORTING PASSED MATHEMATICAL EXAM AND FOREIGN LANGUAGE QUALIFICATION (154-155)

New York University
A private university in the public service
Faculty of Applied Science
Department of Applied Science

Barney Building
26-36 Stuyvesant Street
New York, N.Y. 10003
Telephone: (212) 998-8995

Antonio Ferri Lab.
425 Merrick Avenue
Westbury,NY 11590
Tel:(516) 832-2590

February 23, 1988

TO WHOM IT MAY CONCERN:

February 23, 1988

TO WHOM IT MAY CONCERN:

This is to confirm that Mr. Resat Keles has passed the Mathematical Sciences Qualifying Examination in Applied Science at New York University.

Sincerely,

Gabriel Miller
Graduate Director

APPENDIX R-1

NEW YORK UNIVERSITY
Graduate School of Arts and Science
5 Washington Square North

REPORT ON LANGUAGE QUALIFICATION

October 25, 1988
Date

Student's name Resat S. Keles

Student's present 606 West 116 Street, Apt. 24
mailing address: New York, New York 10027.
Department or Program: Applied Science degree
degree sought: ( ) Masters
Language: Turkish (X) Ph.D.

Space below to be filled out by department only

Please check here:

(X) application for meeting GSAS language requirements

( ) meets departmental requirements only:

( ) second language
( ) third language

The above named student:

(X)has passed) our departmental examination in the above-specified
( )has failed) language administered on_____

( )has successfully completed a credit-bearing ( ) graduate, ( ) undergraduate (N.B., at least fourth semester level) course with a grade of "B" or better not more than two years before date of first registration in GSAS at New York University.

College:_____Term & year of course___
Most Advanced course_____Title:___; Grade:___
Term and year of first registration in GSAS:_____
( )Copy of transcript attached; ( ) Transcript on file in Recording Office

The student has taken language proficiency examinations for the above language_____ times.

SIGNED_____
Departmental verification

The above information meets the language requirements of the Graduate School of Arts and Science.

SIGNED_____
Assistant Dean

Recording Office,white
Department,pink
Student , yellow

APPENDIX S

REPORT FROM DR. ALAN T. MCDONALD TO NYU, WITH ATTACHMENT (172-175)

PURDUE UNIVERSITY

MECHANICAL ENGINEERING

July 27, 1990

Dr. Ferhad Kazemi
Dean
Graduate School of Arts and Science
New York University
Washington Square North
New York, New York 10003

Re: Graduate student Resat Keles

Dear Dr. Kazemi:

Please permit me to introduce myself. I am professor of Mechanical Engineering at Purdue University. A copy of my professional resume is enclosed so that you may evaluate my background and experience.

In December 1989 Mr. Keles took the Ph.D. qualifying examinations in Physical & Chemical Sciences in your Applied Science Department. Mr. Keles provided a copy of this examination for me. A copy of this exam is enclosed.

Mr. Keles also furnished to me a document that he represented to contain his answers to questions 1, 2, 3, 6, and 7 on the qualifying examination. (The examination instructions were to solve any 5 of the 8 problems.) The copy of Mr. Keles' answers is too faint to reproduce. so I have not enclosed a copy.

Mr. Keles asked me to review the grading of his qualifying examination and to provide my comments to you. I have reviewed the examination carefully and my comments follow:

Question 1. The assigned score of 2 out of 20 is appropriate.

Question 2. The total credit for this question appears to have been added incorrectly to begin with. Mr. Keles answered the question on the basis of the maximum work considering the availability of energy. This difference is semantic only; some additional credit should be given. I believe this problem is 60 percent correct.

Question 3. The solution for this problem is correct. An error was made in converting the diffusivity from units of meters to units of centimeters, so that numerical value of diffusivity used to compute the answer was incorrect. That minor does not deserve a 30-percent penalty.

Question 6. This problem received full credit.

Question 7. This problem was solved correctly, but was not completed numerically. The correct equation for the answer was given, but numerical values were not substituted and the answer was not calculated. A 10-percent penalty is appropriate.

My consideration of the grading of this qualifying examination is summarized in the following table:

Question Number	Original Score	Revised Score
1	2/20	2/20
2	20/100	60/100
3	7/10	9/10
6	10/10	10/10
7	8/10	9/10
Total:	56/100	70/100

At Purdue we consider 70 percent to be minimum passing score on a Ph.D. qualifying examination. On this basis the score the Mr. Keles should have received on this exam is passing.

I hope it will be possible to reconsider the grading of this exam or to permit Mr. Keles to retake the examination.

Please let me know if I can be of more assistance.

Sincerely,

Alan T. McDonald, Ph.D., P.E.
Professor of
Mechanical Engineering

Enclosure
cc: Mr. Resat Keles

APPENDIX S-1

RESUME

Alan T. McDonald, Ph.D., P.E.
Professor, School of Mechanical Engineering
Purdue University
West Lafayette, IN 47907 (317) 494-5621

Education: Purdue University, BSME, MSME, Ph.D., 1965

Experience: Since 1974 (and 1967-74,Associate Professor), School of Mechanical Engineering, Purdue University. Duties include teaching and research in fluid mechanic, design, electric and hybrid vehicles, and transportation.

Founder and co-director of Electric & Hybrid Vehicle Laboratory. Work has included care, performance testing, and safety aspects of batteries and battery systems.

1964-67, Assistant Professor of Mechanical Engineering, University of California at Davis.

Industrial experience: several summers of full-time engineering employment and numerous consulting positions in design, test, research and development. More detailed information available upon request.

Licenses: Professional Engineer (Mechanical),California, Certificate No.14,014,April 6, 1967.

Professional Engineer, Indiana, Certificate No.12,767, August 31, 1967.

Publications: More than 50 journal articles and technical reports. Co-author of the widely adopted text, Introduction to Fluid Mechanic (New York: Wiley, 1973 and 1978). Numerous teaching aids and other educational materials.

Honors &Awards: Several departmental and Schools of Engineering awards and in 1980, " Excellence in Oral Presentation "award from Society of Automotive Engineers.

Teaching Experience: Courses at all levels including fluid mechanics,gas dynamics,electric and hybrid vehicles, transportation, engineering graphics,materials strength,thermodynamics, heat transfer, experimental methods,and professional responsibilities of engineers.

Professional Membership: American Institute of Aeronautics &Astronautics (AIAA),'67
American Society for Engineering Education (ASEE), since 1963
American Society for Mechanical Engineers (ASME), since 1958
Society of Automotive Engineers (SAE), since 1956.

Experience Testifying: Both in deposition and court testimony. Technical expert work has been divided almost equally between plaintiff and defendant representation.

APPENDIX T

TRANSCRIPTS AND EXCERPTS FROM DECEMBER, 1989 EXAMINATION BOOKS (176-182)

8/10

7

Student Name: RESAT KELES
Subject
Instructor's Name

NEW YORK UNIVERSITY

Rules for Examination

1. No student is permitted to enter the examination room after, or leave before one hour of the time scheduled for the examination has elapsed.

2. No student is permitted to have in his possesion in the examination room, books or papers of any kind,except such books or papers as are expressly given out by the proctor or expressly permitted by the instructor. Possession of such material will be regarded as evidence of intent to use the information dishonestly.

3.Students must not leave their seats during an examination. Positively no cummunications between students during the examination is permitted. If there are necessary questions of if there is need for any additional material, the proctors should be asked.

4. Pages are not to be torn from examination books,and the question paper is to be signed and returned, but must not be written upon otherwise.If there is any need for calculations or notes , they may be written in the back of the examination book and crossed out.

Violation of these rules may be punished by expulsion from the University.

I, certify that I have read the above rules for Examinations and that will abide by them.

1] A rectangular fin,

δ=0.05"

L=2"

k=26 BTU/hr- °F

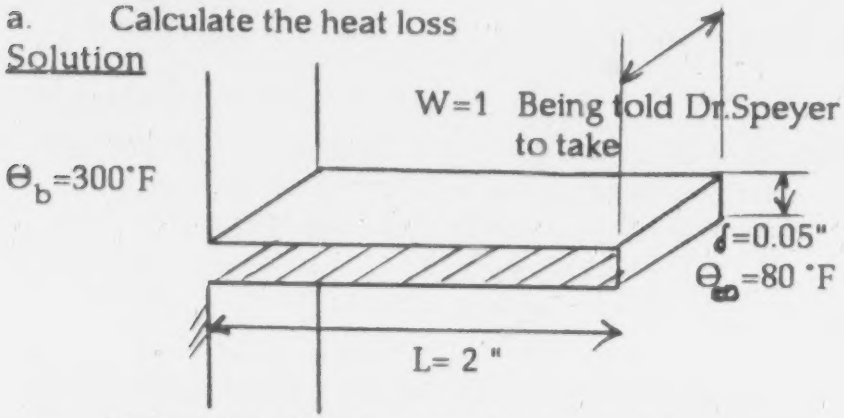
h=10 BTU/hr-ft °F

Θ_∞=80 °F

Θ_b=300 °F

a. Calculate the heat loss

Solution



If heat transfer from end is negligible, then the rate of of heat transfer from rectangular fin is given by,

$$Q = \sqrt{hPk}\,\delta\,\Theta_b \tanh mL \qquad (1)$$

Since width of the fin is much larger than its thickness i.e. $\delta << 1$

Therefore P= 2 (Perimeter Area)

Therefore,

$$Q = \sqrt{2h}\,\delta\,O_b \tanh\left(\sqrt{2h}\,L\delta/k\delta^{3/2}\right)$$

Here we calculate parameters,per unit inch

$\tanh(\sqrt{2}hL/k.L\delta/\delta^{3/2}) = \tanh(\sqrt{2}x10/26(2x0.05)1/(0.05)^{3/2}$

$= \tanh(\sqrt{20}/26(0.1)1/(0.05)^{1.5}$

$= \tanh(0.877x0.1))1/0.0111$

$= \tanh(0.877\ x0.1x\ 89.44)$

tanh (7.844) Table for hyperbolic for tanh (u) gives for 7.844 ≈ 1.000

nextly, $\sqrt{2hk\delta} = \sqrt{2x10x26x0.05} = \sqrt{26} = 5.099$

Therefore, heat loss from fin is

$\dot{Q} = 5.099 \times 300 \times (1{,}000)$

$\dot{Q} = 1529.7$ BTU/hr-inh^2 ° F

Further Comments

Schmidt suggested that a criterian for most favorable fin dimension might be the maximum value of $\dot{Q}/\Theta_b$ for a given amount of fin material (which is proportional to product $L\delta$). Taking h,k, and product $L\delta$ to be constants, if we differentiate 1 with respect to δ and set the result equal to zero, we obtain

$$M = 1/6 \text{ Sinh } 2M \qquad (2)$$

where

$$M = mL = \sqrt{2h/k} \cdot L\delta / \delta^{3/2}$$

The transcendal eqtn. (2) can be solved numerically or graphically by plotting both sides against M, and determining the point of intersection of the two curves. Thus, if a value of

$M = mL = 1.4192$ is to be obtained

(but we have 1.00)

The most favorable thickness to length ratio is given by, $L/\delta = 2/(1.4192)^2 \cdot hL/k \qquad (3)$

Combining this with (1), we have

$$L = 0.7978/h \cdot \dot{Q}^2/\Theta_b$$

and $\delta = 0.631/hk\,(Q/\Theta_b)$

The temperature at the tip of this favorable fin will be, $\Theta(L)/\Theta_b = 1/\text{Cosh } mL = 1/\text{Cosh } mL \qquad (4)$

with $mL = 0.2915$

$\Theta(L)/\Theta_b = 1/\text{Cosh } mL = 1/\text{Cosh } (0.2915) = 0.45706$

The eqtn.(4) provides a test as to whether or not L to be optimum length by measurement of $\Theta(L)$ and Θ_b

with our values,

$M=m=\sqrt{2h/k}\, L_\delta/\delta^{3/2}$

$= \sqrt{2x10/26}\,.\,2X0.05/(0.05)^{1.5}=7.844$

Then, $\Theta(L)/\Theta_b = 1/\text{Cosh } mL = 1/\text{Cosh}(7.844)$

Table of hyperbolic functions for

Cosh(u) for 7.844 ≈8.00≈ 1490.5

then,

$\Theta(L)/\Theta_b = 1/1490.5$

$\Theta(L)/\Theta_b = 0.0006709$

APPENDIX U

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2/20

1

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Subject _____
Instructor's Name _____

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I,_____,certify that I have read the above rules for Examinations and that will abide by them.

1A.

Energy Balance

$RS - RS\mathcal{L} = R_e$

$R_s = SXA$

where A=area of dis.

$R_s = \epsilon G T_e^4 xA$

$A = \pi a^2$

where,

A=surface area

$A = 4\pi a^2$

$\therefore S\pi a^2(1 - L) = \epsilon 4 \sigma \pi a^2 T_e^4$

L=Albedo

$T_e = \sqrt[4]{S(1-L)/4\epsilon\sigma}$

with, $S = L_s/4\pi a^2 \approx 1380\ W/m$

$a_{earth} = 1.5 \times 10^{11} m$

$L = 0.30$

$T_e \approx 298\ ^\circ K$

B. Energy absorbed per second by each planet is given by

APPENDIX V

17/25
+0/30
+0/30
+3/15
20/100

20/100 2

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Instructor's Name _____

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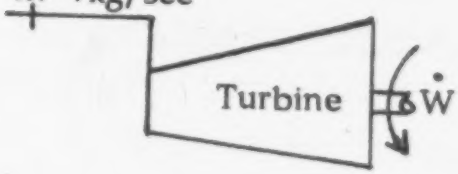
2] Steam enters into adiabatic turbine at a rate $\dot{m} = 7$ kg/sec Assume $T_o = 25\ ^\circ C$

$P_2 = 200$ kPa

Calculate possible max output of turbine

$P_1 = 2.5$ MPa, $T_1 = 500\ ^\circ C$

$\dot{m} = 7$kg/sec



$T_o = 25\ ^\circ C$

$P_2 = 200$KPa

$P_2 = 0.02$Mpa

Maximum work= change in availability

$\dot{\psi} = (\dot{H} - T_o \dot{s}) - (\dot{H} - T_o \dot{s})$

$= -\Delta \dot{H} + T_o \Delta \dot{S}$

$\dot{\psi} = [h_2 - h_1 - T_o (S_2 - S_1)]\ \dot{m}$

At $p_1 = 2.5$ MPa $T = 500\ ^\circ C$ from steam table

$h_2 = 3462.1$ kJ/kg $S_2 = 7.3234$ kJ/kg

At $P_2 = 0.2$ MPa

$h_o = 504.70$- kJ/kg $s_o = 1.5301$ kJ/kg $^\circ K$

Then, maximum work, or availlability is,

$\dot{\psi} = [3462.1 - 504.7 - 298\ ^\circ K(7.3234 - 1.5301)]\ 7$ kg/sec

$\dot{\psi} = [2957.4 - 298(5.7933)]\ 7$

$\dot{\psi} = (2957.4 - 1726.4)\ 7$

$\dot{\psi} = (1231)\ 7 = 8617$ kJ/sec

Air $T_1 = 47\ ^\circ C$, $P_1 = 200$ kPa

$P_1 = 0.2$ MPa

$T_1 = 267\ ^\circ C$ $P_1 = 0.8$ MPa

Assume air behaves as ideal gas, calculate the entropy change per unit mass during process

(c) the process reversible. Take $C_p = 1.005$

Entropy given by,

$S_2 - S_1 = \int_1^2 dq / T = C_p \ln T_2/T_1$

per unit mass,

$S_2 - S_1 = 1.005 \ln 47+273/267+273 = 1.005 \ln 320/500$

$S_2 - S_1 = 1.005 \ln 0.592 = 1.005 (- 0.524) = - 0.526$ KJ/kg °K

(c) the process irreversible, per unit mass

$S_2 - S_1 = \emptyset_2 - \emptyset_1 - R \ln P_2 / P_1$

$\emptyset_1 = \emptyset_2$ assume

$S_2 - S_1 = -287 \ln 0.8/0.2 = - 287(1.386) = -397.78$ kJ/kg °K

(a) process is internally reversible per unit mass basis,

$S_2 - S_1 = C_v \ln T_2 / T_1$

$\Rightarrow C_v = 0.718$ (Table)

$S_2 - S_1 = 0.718 \ln 320/540 = 0.718(-524)$

$= - 376.23$ kJ/kg°K

0/30

Calculate missing properties in table.

Substance	P(kPa)	T °C	Calculated (v(m / kg)
Air	100	300	...
CO_0	50	200	...
H_2O	300	240	...
H_1O	?	320	85
N_2	50	?	2000

Specific values calculated from ideal gas eqtn. for Air

$P = mRT/V$ $\quad \therefore V = V/v \,.\, RT/P$

$\therefore v = RT/P \Rightarrow R = 0.287$ kN/m³/ kg °K

v= 0.287 x (300+273)/100= 0.287x 573/100

v = 164,451/100 = 1.644 m^3/kg

v= 1.644 m^3 /kg *(Correct)* **+5**

for CO, R= 188.9 J/kg-°K (Table)

1/5 v= 89349.7/50 = 1786.99 m^3/kg

for $H_2O(g)$ R= 460.6 J/kg-°K (Table)

1/5 v= 460.6 x (240+273)/300 = 787.62 m^3/kg

for H_2O (g),

using v = RT/P

R= 460.6 J/kg° K, v= 85m^3/kg=> assumed unit mass

P= 460.6 (320+273)/85

P= 3213.36 kPa **5/5**

For nitrogen, N_2

To find T = ?

given v = 2000 m^3 /kg with R= 296.6 J/kg°K(Table)

∴ v= RT/P

∴ v= vP/R = T

∴ T = 2000x 50/296.6

T = 337.15 °C

Calculated values as approximately entered table

APPENDIX W

7/10 3

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3. Given

0.25 wt % carbon concentration is to be treated at 950 ° C (1750 °F)

if concentration of carbon at surface suddenly brought to &maintained at 1.20 wt % with position x= 0.5 mm below surface with

$D= 1.6x10^{-11}$ m/sec $D= 1.6x10^{-13}$ cm/ sec

Calculate

How long it will take to achieve a carbon content of 0.80 wt % at that position

Solution

x= 0.5 mm = 0.05 cm

$D= 1.6x\ 10^{-11}$ m/sec = $1.6 x\ 10^{-13}$ cm^2/sec

$C_i = 0.25$ $C_e = 1.2$ C= 0.80

We obtain solution by

$C^* = erf[x/\sqrt{4Dt}]$

Where, $C^* = C- C_i/C_e- C_i$

and C is the concentration at a position x,

At x= 0.5 mm= 0.05 cm, C= 0.80 %

Then, $C^* = 0.80 - 0.22/1.2-0.22 = 0.58/0.98$

$C^* = 0.591$

Since , $C^* = erfc\ [x/\sqrt{4Dt}]$

$\therefore\ x/\sqrt{4Dt} = erf^{-1}(0.591)$

from table of error function for complementary error function

1-erf(u) ≈ 1- 0.59593 = 0.59593 ≈ 0.60

Hence $x/\sqrt{4Dt} \approx 0.60$,

Solving for time, $t = [x/0.60]^2\ 1/4D$

$t= [0.05/0.60]^2\ 1/4(1.6x10^{-11})$

$t=(0.0833)^2\ 1/6.4x10^{-11}$

$t= 0.00694x1.56x10^{10}$

$t= 1.084x10^8$ sec

$t= 1.084\ x10^8/3600$, $t= 3.011\ x10^4$ hrs

APPENDIX X

10/10 6

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Subject
Instructor's Name

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6. A pitot tube is to be located 3" aft of leading edge of a bottom of undercarriage of a blimp. Assume that

1. Bottom surface is very nearly flat,
2. Pressure gradient is negligible

V= 25 to 100 mph

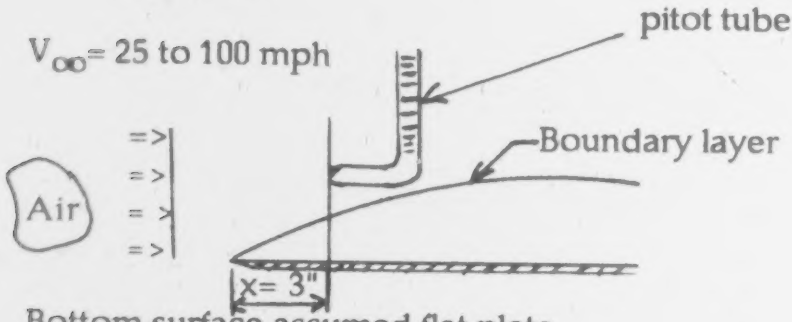
T= 32 °F

The pitot is to be used to measure the air speed & must be outside boundary layer.

a. What is the max.boundary thickness at this location.

b. What is the shear value at this location

Solution



Bottom surface assumed flat plate

Air table properties at T= 32 °F

$\rho = 0.081$ lb/ft

$C_p = 0.240$ BTU/lb °F

$\mu = 1.165 \times 10^{-5}$ lb/ft sec

$\nu = 0.145 \times 10^{-3}$ ft^2 sec

$k = 0.0140$ BTU/hr ft^2 °F

$Pr = 0.72$

x= 3 " = 3/12= 0.25 ft

First to determine the Reynolds number to determine whether the flow is laminar or turbulent at x= 0.25 ft

5280 ft = 1 mile 3600 sec = 1 hr

for V= 25 miles per hour

We need in V= 5280x 25/3600= 36.66 ≈ 36.7 ft/sec
and V= 100 miles per hour

$V=5280 \times 100/3600 = 146.66 \approx 146.7$ ft/sec

$Re_x = Vx/v = 36.7x\ 0.25/0.145x10^{-3} = 9.175/0.145x\ 10^{-3}$

$Re_x = 6.32 \times 10^4$ which is $<5x10^5$

Thus, air flow is laminar because smaller than $5x10^5$

where transition occurs at v= 36.7 ft/sec, where laminar flow exist at x= 0.25 ft

Thickness of boundary layer

$\delta = x\ 5/Re_x^{0.5}$

$\delta = 0.25\ x5\ /\ (6.32x10^4)0.5$

$\delta = 1.25/251x\ 10^2 = 1.25/251 = 0.00498$ft

with V= 146.7 ft/s

$Re_x = 146.7 \times 0.25/0.145x10^{-3} = 36.675/0.145x10^{-3}$

$Re_x = 2.52 \times 10^5$

Also laminar because is less than $5x10^5$

Boundary layer thickness,

$\delta = x\ 5/Re_x^{0.5}$

$\delta = 0.25\ x5/\ (2.52x10^5)0.5 = 1.25/501.9$

$\delta = 0.00249$ ft

Therefore, with velocity V= 36.7 ft/sec

Boundary layer thickness,

$\delta = 0.00498$ ft

with velocity V= 146.7 ft/sec

Boundary layer thickness,

$\delta = 0.00249$ ft

so with velocity V = 36.7 ft/sec (25 mph) gives maximum boundary layer thickness, so answer to

(a) $\delta|_{x=3\ inch} = 0.00498$ ft

ANSWER

(b) Shear value at this location is found by

$\tau_{|x=3\ inch} = 0.332\ \mu V / g_c x \sqrt{Re}$

with $V = 36.7$ ft/sec (25 mph) $x = 3" = 0.25$ ft

$\tau_{|x=0.25\ ft} = 0.332 \times 1.165 \times 10^{-5} / 0.25 \times 32.2 \sqrt{6.32 \times 10^4}$

$\tau_{|x=0.25\ ft} = 0.386(2.51) / 0.25 \times 32.2 = 97 / 8.05$

$\tau_{|x=0.25\ ft} = 12.04\ lbf/ft^2$

answer

APPENDIX Y

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BASIS OF ADMISSION: B.E. 1984,MANHATTAN COLLEGE
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		SPRING 1984	Pts	Grade	Pts.	Grade	Pts	Grade
	G121206	EN SOURCES I	3.0	A				
	G121302	FLUIDMECHANI C	3.0	A				
	G121401	FUND EN II	3.0	A				
	G122305	TURBULENCE II	3.0	A-				

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THESIS: MS: SPECIAL PROJECT IN LIEU OF THESIS

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FALL	1984		Pts	Grade	Pts	Grade	Pts	Grade
G12	1304	APPL MODN PH.	3.0	A				
G12	1400	FNDMNTLS EN	3.0	A				
G12	2306	ENERGY CONV.	3.0	A				
G12	2308	SOLAR ENERGY I	3.0	A-				
G12	3402	DISSERTATN RES	3.0	A				

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Spring	1985		Pts	Grade	Pts	Grade	Pts	Grade
	G121306	REACTION KIN	30	A				
	G122300	MATERIAL SCI	30	A				
	G122307	ENGR TRANSM	30	A-				
	G122309	SOLAR EN II	30	A-				
			Pts	Grade	Pts	Grade	Pts	Grade
FALL	1985		Pts	Grade	Pts	Grade	Pts	Grade
	G121205	ENERGY SO I	30	A-				
	G121412	PLCY ISSUES I	30	A				

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RECORD IN RESIDENCE: I.D. # 011-62-8809
NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN

		PTS.	GRADE
FALL 1985			
G12 2206	FUEL PROCESSING	30	A
G12 2304	TURBULENCE I	30	A
G12 3202	INDEPENDENT STUDY	30	A
SPRING 1986			
G12 3202	INDEPENDENT STUDY	30	A
G12 3203	INDEPENDENT STUDY	60	A
G12 3220	EARTH SYSTEM SCIENCE	30	A

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RECORD IN RESIDENCE: I.D. # 011-62-8809
NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN

		PTS.	GRADE
FALL	1986		
G121404	HEAT &MASS TRANSFER	3.0	W
G121410	ATMOSPHERES &OCEANS	3.0	A-
G123202	INDEPENDENT STUDY	3.0	A
G123205	PRBLMS IN EN.SCI II	3.0	A
G121222	ANLYT MTDS ENR I	3.0	A
SPRING	1987	PTS.	GRADE
G121223	ANALYTICAL METH II	3.0	A
G123260	INTRO APPLD MAGNETO	3.0	B

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NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN
1987/1988 MAINTAINING MATRICULATION

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APPENDIX Y-1

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ADMITTED:SPRING 1984
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	G121206	EN SOURCES I	3.0	A				
	G121302	FLUIDMECH ANIC	3.0	A				
	G121401	FUND ENERGY II	3.0	A				
	G122305	TURBULENCE II	3.0	A-				

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Dep	Course No.	COURSE TITLE	SEPT-FEB Pts	SEPT-FEB Grade	FEB-JUNE Pts	FEB-JUNE Grade	SUMMER Pts	SUMMER Grade
FALL 1984			Pts	Grade	Pts	Grade	Pts	Grade
G12	1304	APPLD MODN PH	3.0	A				
G12	1400	FNDMNTLS EN	3.0	A				
G12	2306	ENERGY CONV	3.0	A				
G12	2308	SOLAR ENERGY I	3.0	A				
G12	3402	DISSERTATN RES	3.0	A				

(SEE PAGE TWO)

THESIS: MS: SPECIAL PROJECT IN LIEU OF THESIS

DEGREE CONFERRED: MASTER OF SCIENCE:JUNE 6,1985

REMARKS

DATE
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RECORD OF RESAT S*KELES
606 WEST 116 ST
N.Y. N.Y. 10027
*SEMSETTIN

DEPARTMENT:APPLIED SCIENCE PROGRAM: M S - P H . D .
ADMITTED:SPRING 1984
BASIS OF ADMISSION: B.E. 1984 MANHATTAN COLLEGE
GRADUATE CREDIT TRANSFERRED(1)

Dept. Number COURSE TITLE Credit Certified Grade Credit Graduated

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Dep	Course No.	COURSE TITLE	SEPT-FEB Pts	SEPT-FEB Grade	FEB-JUNE Pts	FEB-JUNE Grade	SUMMER Pts	SUMMER Grade
Spring	1985		Pts	Grade	Pts	Grade	Pts	Grade
	G121306	REACTION KIN	3.0	A				
	G122300	MATERIAL SCI	3.0	A				
	G122307	ENGR TRANSM.	3.0	A-				
	G122309	SOLAR EN II	3.0	A-				
			Pts	Grade	Pts	Grade	Pts	Grade
FALL	1985		Pts	Grade	Pts	Grade	Pts	Grade
	G121205	ENERGY SO I	3.0	A-				
	G121412	PLCY ISSUES I	3.0	A				

(SEE PAGE TWO)

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(PAGE TWO)

DEPARTMENT: APPLIED SCIENCE
* SEMSETTIN
SPECIALIZATION:
ADMITTED:
PROGRAM: MS-PH.D.
Basis of Admission:

DATE OF BIRTH 4-15-50 I.D. NUMBER 011-62-8809
GRADUATE CREDIT TRANSFERRED (1)

Dept.	Number	COURSE TITLE	Credit Certified	Grade	Credit Graduated

RECORD IN RESIDENCE: I.D. # 011-62-8809
NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN

		PTS	GRADE
FALL 1985			
G122206	FUEL PROCESSING	30	A
G122304	TURBULENCE I	30	A
G123202	INDEPENDENT STUDY	30	A
SPRING 1986			
G123202	INDEPENDENT STUDY	30	A
G123203	INDEPENDENT STUDY	60	A
G123220	EARTH SYSTEM SCIENCE	30	A

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(PAGE TWO)

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NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN

FALL 1986		PTS.	GRADE
G121404	HEAT &MASS TRANSFER	3.0	W
G121410	ATMOSPHERES &OCEANS	3.0	A-
G123202	INDEPENDENT STUDY	3.0	A
G123205	PRBLMS IN EN SCI II	3.0	A
G121222	ANLYT MTHDS ENR / I	3.0	A
SPRING 1987		PTS.	GRADE
G121223	ANALYTICAL METHDS II	3.0	A
G123260	INTRO APLD MAGNETO	3.0	B

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(PAGE THREE)

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ADMITTED: PROGRAM: MS-PH.D.

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RECORD IN RESIDENCE: I.D. # 011-62-8809

NUMBERS AND DESCRIPTIVE TIT OF COURSES TAKEN

1987/1988 MAINTAINING MATRICULATION

1988/1989 MAINTAINING MATRICULATION

FALL MAINTAINING MATRICULATION

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APPENDIX Z

PLAINTIFFS OFFICIAL TRANSCRIPT, SHOWING ALTERATIONS IN THE THREE PAGES OF THE WORD " PH.D. " AFTER THIS LAW SUIT COMMENSED (127 127-A 128)

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RECORD OF RESAT S*KELES
606 WEST 116 ST
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Dep	Course No.	COURSE TITLE	SEPT-FEB Pts	Grade	FEB-JUNE Pts	Grade	SUMMER Pts	Grade
	SPRING 1984		Pts	Grade	Pts	Grade	Pts	Grade
G12	1206	EN SOURCES I	3.0	A				
G12	1302	FLUIDMECH ANIC	3.0	A				
G12	1401	FUND ENERGY II	3.0	A				
G12	2305	TURBULENCE II	3.0	A--				

(SEE PAGE TWO)
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Dep.	Course No.	COURSE TITLE	SEPT-FEB Pts	SEPT-FEB Grade	FEB-JUNE Pts	FEB-JUNE Grade	SUMMER Pts	SUMMER Grade
FALL 1984			Pts	Grade	Pts	Grade	Pts	Grade
	G12 1304	APPMODERN PH	3.0	A				
	G12 1400	FNDMNTLS EN	3.0	A				
	G12 2306	ENERGY CONV	3.0	A				
	G12 2308	SOLAR ENERGY I	3.0	A-				
	G12 3402	DISSERTATN RES	3.0	A				

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	Spring	1985	Pts	Grade	P ts.	Grade	Pts	Grade
	G121306	REACTION KIN	3.0	A				
	G122300	MATERIAL SCI	3.0	A				
	G122307	ENGR TRANSM.	3.0	A-				
	G122309	SOLAR EN II	3.0	A-				
			Pts	Grade	Pts.	Grade	Pts	Grade
	FALL	1985	Pts	Grade	Pts.	Grade	Pts	Grade
	G121205	ENERGY SO I	3.0	A-				
	G121412	PLCY ISSUES I	3.0	A				

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		PTS.	GRADE
FALL 1985			
G12.2206	FUEL PROCESSING	30	A
G12.2304	TURBULENCE I	30	A
G12.3202	INDEPENDENT STUDY	30	A
SPRING 1986			
G12.3202	INDEPENDENT STUDY	30	A
G12.3203	INDEPENDENT STUDY	60	A
G12.3220	EARTH SYSTEM SCIENCE	30	A

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G121410	ATMOSPHERES & OCEANS	3.0	A-
G123202	INDEPENDENT STUDY	3.0	A
G123205	PRBLMS IN EN SCI II	3.0	A
G121222	ANLYT MTDS ENR I	3.0	A
SPRING 1987		PTS	GRADE
G121223	ANALYTICAL METHODS II	3.0	A
G123260	INTRO APPLD MAGNETO	3.0	B

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